

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CARISSA PERONIS, et al.,  
Plaintiffs

vs.

UNITED STATES OF AMERICA, et  
al.,

Defendants.

Civil Action No.

16-1389

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Transcript from proceedings on September 5, 2019, United  
States District Court, Pittsburgh, PA,  
before Judge Nora Barry Fischer.

APPEARANCES:

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For the Hospital Weber Gallagher Simpson Stapleton  
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Proceedings recorded by mechanical stenography;  
transcript produced by computer-aided transcription.

1           THE COURT: Good morning, everyone. This is the time  
2 for proceedings in the case of Carissa Peronis, et al., versus  
3 United States of America. Overnight following our discussion  
4 yesterday, we sent out another version of the final jury  
5 instruction, discussion draft No. 7, and to that end,  
6 Ms. Starr advises me that she had no additional corrections,  
7 comments or the like that came from counsel. Is that the  
8 case, Mr. Price?

9           MR. PRICE: No further comments.

10          THE COURT: Ms. Koczan?

11          MS. KOCZAN: Yes, no further.

12          THE COURT: Now that we have an approved set, this  
13 will be Court Exhibit -- what are we up to, Nicole.

14          THE CLERK: E.

15          THE COURT: This is Court Exhibit E that's been  
16 approved by all counsel.

17          THE CLERK: 5.

18          THE COURT: Also counsel should have the verdict  
19 slip. Mr. Galovich retyped it, if you will, so that the  
20 questions followed. There was an e-mail exchange concerning  
21 the extent of damages vis-a-vis The Wrongful Death Act and The  
22 Survival Act. I think we have agreement; is that correct,  
23 Mr. Price and Ms. Koczan?

24          MS. KOCZAN: That is correct.

25          THE COURT: And you have all had a chance to look at

1 the reformulated verdict slip?

2 MR. PRICE: Yes.

3 THE COURT: There are no changes to same, correct?

4 MR. PRICE: Correct.

5 MS. KOCZAN: Correct.

6 THE COURT: So that's Court Exhibit F.

7 THE CLERK: Your Honor, they were going originally by  
8 numbers so I guess that will be 6 then.

9 THE COURT: That's fine. Whatever it is. Are we  
10 prepared and ready to proceed? Anything need to be done here  
11 in the courtroom before closings?

12 MS. KOCZAN: Your Honor, I just need one minute.  
13 This is then the final version of the verdict slip?

14 THE COURT: Yes.

15 MR. PRICE: Your Honor, since we have the time, the  
16 only thing I'll do pursuant to the court's direction, I have  
17 copies of my PowerPoint.

18 THE COURT: I appreciate that. Let the record  
19 reflect that Mr. Price is providing counsel and the court with  
20 copies of his PowerPoint which will be demonstrative to his  
21 closing argument.

22 MS. KOCZAN: Your Honor, while I have a PowerPoint,  
23 it doesn't include any medical records or anything. It's just  
24 my verbiage. That's it. It is just my argument. That's all.

25 THE COURT: Okay. Mr. Galovich, all of our jurors

1 here?

2 THE CLERK: No, Your Honor, not yet.

3 THE COURT: Ms. Koczan, back to what your PowerPoint  
4 says, what do you have? Bullets?

5 MS. KOCZAN: No, it's my argument. It's just on  
6 paper, so it's not -- there's nothing like what is in here.  
7 I'm not showing documents or pictures or anything like that.  
8 It's just my argument.

9 THE COURT: Understood.

10 MR. PRICE: Your Honor, I don't understand the  
11 difference. Why can't I see them?

12 THE COURT: It would seem to me -- the other thing  
13 I'm concerned about it's going to be projected to the jury, so  
14 to that end, I think we should have a copy as a demonstrative  
15 exhibit.

16 MS. KOCZAN: Your Honor, I can give the court this  
17 copy after I'm done because I'd like to use it while I'm doing  
18 it and I can give it to them.

19 THE COURT: Why don't we get copies for everybody?  
20 Ms. Starr, you can handle that while Mr. Galovich logs.  
21 Mr. Colville should have one, Mr. Price should have one and I  
22 should have one to follow along and then you'll need one,  
23 Mr. Galovich.

24 MS. KOCZAN: This is the last page but this is not  
25 going to be on there so only this.

1           THE COURT: It's the hospital defendant's closing  
2 argument demonstrative.

3           As I told you yesterday, we were working on the  
4 memorandum order vis-a-vis my ruling on the corporate  
5 negligence issue, and in addition to what I put on the record,  
6 I would also add that Dr. Karotkin, although at one point he  
7 indicated that -- the question was: You would agree you can  
8 have a standard that differs from yours that can still meet  
9 the standard of care?

10          Then he said: As I noted yesterday, I don't know if  
11 that's true. I guess. I always thought the standard of care  
12 would be what a reasonable person would do in a similar  
13 circumstance in a similar hospital.

14          But then he went on to say: Would you agree that  
15 this hospital provides the minimum standard of care?

16          Answer: Well, again, I would disagree in the sense  
17 that they don't advocate for having a pediatrician in  
18 attendance at a delivery where there are at least four or five  
19 risk factors.

20          Then the question was: That doesn't mean it doesn't  
21 meet the standard of care. You just disagree and you think a  
22 pediatrician should be present.

23          Answer: Well, it doesn't meet the standard of care  
24 that I think I would impose on a hospital delivering patients.

25          Then the question: But it's what the reasonable

1 doctor would, not just one doctor. It's across the board,  
2 what's agreed to, as a reasonable standard.

3 Answer: Well, again, I think -- again, I'm not  
4 trying to be argumentative. I'm trying to explain my answer. I  
5 think if you ask the vast majority of pediatricians or  
6 neonatologists if a pediatrician should be in attendance where  
7 there is a delivery anticipated with meconium-stained fluid,  
8 vacuum extraction, delayed descent, some question of  
9 abnormalities of the fetal heart rate, I think most of them  
10 would agree that a pediatrician should be present at that  
11 delivery to evaluate the patient, whether they need to or not.

12 So the court is also going to be relying on that  
13 language in our memorandum opinion which, in my estimation,  
14 bolsters the court's decision that the issue of the corporate  
15 negligence on the policy issue does go to the jury, and the  
16 court, you know, finding that those experts, just as the  
17 defense experts, were appropriately qualified experts, and  
18 that was his opinion in terms of what the standard of care is.

19 And the jury can make a determination whether, number  
20 one, that policy was or wasn't reasonable, and number two,  
21 whether it was or wasn't followed.

22 In addition, as I said yesterday on the record, the  
23 allegations of corporate negligence in the complaint go far  
24 beyond the policies.

25 Let the record reflect that Mr. Galovich is now

1 providing copies of the PowerPoint presentation that  
2 Ms. Koczan intends to use. He has retained one for the  
3 court's records. Mr. Galovich, where are we vis-a-vis head  
4 count?

5 MS. KOCZAN: Your Honor, it is not included in my  
6 PowerPoint, but I was going to show the first page of this.

7 THE COURT: Not a problem.

8 (Jury present.)

9 THE COURT: Morning ladies and gentlemen of the jury.  
10 As I told you last evening, we're going to start this morning  
11 with closing arguments, and to that end, I have a limiting  
12 instruction on closing arguments.

13 You have now heard and seen all the evidence in this  
14 case. The lawyers now have the opportunity to present their  
15 closing arguments. The defendants will argue first. Then the  
16 plaintiffs will present their closing argument. Closing  
17 arguments are designed to present to you the parties' theories  
18 about what the evidence has shown and what conclusions may be  
19 drawn from the evidence. Remember, what is said in closing  
20 arguments is not evidence. You have already heard and seen  
21 all of the evidence in this case.

22 After the lawyers present their closing arguments,  
23 I'll give you my final instructions concerning the law that  
24 you must apply to the evidence in reaching your verdict.  
25 Although the lawyers may mention points of law in their

1 closing arguments, the law that you must follow in reaching  
2 your verdict is the law that I will give you in final  
3 instructions. If there is any difference between what the  
4 lawyers say about the law and what I tell you in the final  
5 instructions, you must follow my instructions.

6 Now, with that, we'll turn to the defendants.

7 Ms. Koczan?

8 MS. KOCZAN: Thank you, Your Honor. Your Honor,  
9 counsel, ladies and gentlemen of the jury, we have reached the  
10 final phase of this lawsuit and of this trial, and in a few  
11 moments, we are all going to be making closing arguments, but  
12 before I begin mine, I wanted to thank each and every one of  
13 you on behalf of my clients, Dr. Jones and Heritage Valley  
14 Beaver and Heritage Valley Pediatrics, for the time that you  
15 have spent in the courtroom.

16 We know that this is a major inconvenience for you,  
17 and we appreciate you being here, but more importantly, we  
18 appreciate the attention that each and every one of you has  
19 given to this case. There has often been long, repetitive  
20 testimony. I can assure you it was not my intention to bore  
21 you to tears with repeatedly putting up the same documents,  
22 but because I can't ask you if you saw that, if you understood  
23 that, I need to make sure that you did, so on behalf of my  
24 clients and on behalf of all of the litigants, thank you very  
25 much for being here and participating in this most important



1 process.

2 Before we talk about the issues in the case, I want  
3 to begin by talking about things that are not issues in the  
4 case. The first nonissue in the case is Kendall's condition  
5 at the time of delivery. Everybody, including the plaintiffs'  
6 experts, have said that Kendall, with an Apgar score of eight,  
7 was a healthy baby. I don't think there's any dispute. Or at  
8 least appeared to be a healthy baby at that time. No dispute  
9 about that. Everyone agrees that that Apgar score was a good  
10 score that indicated at that time a healthy baby.

11 The second nonissue, what a pediatrician would have  
12 done if one had been called to the delivery room. I think all  
13 the experts agree that if a pediatrician had been called with  
14 Kendall having an Apgar score of eight and a completely normal  
15 assessment, there would have been nothing to do immediately.  
16 There would be no resuscitation that was necessary beyond that  
17 that was provided by Nurse Hendershot. There would be no  
18 reason to do anything further, including order antibiotics at  
19 that time. No disagreement as to that.

20 Now, beyond that, there is disagreement and we'll  
21 talk about that later.

22 The care provided by Dr. Jones once she arrived at  
23 the hospital around 8:00. There are no criticisms of anything  
24 that Dr. Jones did. Everyone, including plaintiffs' experts,  
25 said when she got there at 8:00, she did a great job. That is

1 not an issue in the case, any of her care, anything she did at  
2 that point.

3 The last issue in the case, Kendall's cause of death.  
4 Now, there is some issue as to contributing factors, but I  
5 believe that everyone agrees that Kendall died of an E. coli  
6 sepsis. That was the cause of her death.

7 So what issues remain in this case that you need to  
8 decide when you begin your deliberations? The first issue is  
9 should the nurses, and in this case, it would have been  
10 Nurse Hendershot or Nurse Gantz who you didn't hear from, she  
11 was one of the other nurses present, should they have called a  
12 pediatrician to attend Kendall's delivery or advocated for  
13 Dr. Dumpe to call a pediatrician to be present. That's going  
14 to be one of the issues you have to decide.

15 The second issue, if a pediatrician had been called,  
16 would there have been an earlier recognition of the E. coli  
17 sepsis and, therefore, earlier antibiotic administration?  
18 That is the second issue that you are going to have to decide.

19 The next issue, was there any evidence of respiratory  
20 distress prior to 7:25 a.m. for which a pediatrician should  
21 have been called?

22 And finally, was Dr. Jones called at 7:20 a.m., and  
23 if so, whether her arrival at the hospital at 8:00 deviated  
24 from the standard of care.

25 There's one additional issue too that is not included

1 in that is whether the hospital's policies were in keeping  
2 with the applicable standard of care, so those are the issues  
3 that you are going to have to decide when you begin your  
4 deliberations.

5 I skipped another one, whether earlier administration  
6 of antibiotics would have made a difference in the outcome,  
7 given an overwhelming E. coli sepsis. That is perhaps the  
8 most significant of the issues that you are going to have to  
9 decide. Would earlier treatment have made any difference in  
10 this case, given the infection that this child had.

11 We talked earlier and the judge is going to give you  
12 instructions, but you are going to be asked to decide whether  
13 these health care providers were negligent, so it's important  
14 to understand what that means. We talked about this before,  
15 that negligence means that the health care provider has a  
16 duty, and we don't disagree with that.

17 These health care providers were -- they were in the  
18 hospital to care for Kendall and Carissa. Whether there was a  
19 breach of duty, and that testimony came from the experts. You  
20 heard the experts come in and offer opinions as to whether  
21 there was compliance with the standard of care or deviation  
22 from the standard of care. That's where that evidence is  
23 going to come from.

24 Causation and then harm. If you put it all together,  
25 negligence means a breach of duty that caused harm, so that is

1 what you are going to have to decide.

2 An important thing to keep in mind though, the mere  
3 occurrence of an injury or unfortunate result does not prove  
4 negligence just because of something unfortunate. There is no  
5 dispute that what happened here was tragic, but just because  
6 that happened, it doesn't mean that these health care  
7 providers were negligent.

8 And the burden of proof. The judge will give you  
9 instructions, but recall that the burden of proof rests solely  
10 with the plaintiff. The defendants don't have to prove  
11 anything. It isn't their obligation to prove the case. Think  
12 of the scales of justice and the judge will instruct you  
13 accordingly.

14 So let's talk a little bit about the expert  
15 witnesses, because that's where the testimony is regarding  
16 whether there was compliance or deviation from the standard of  
17 care.

18 On behalf of the plaintiff, we had Dr. Zamore come in  
19 here, and if you remember, he was the very first expert that  
20 plaintiffs put on, and he was the obstetrician gynecologist  
21 who, if you recall the cross-examination, did a lot of  
22 gynecology rather than obstetrics, but he practices at Yale.

23 For the plaintiffs, we have Dr. Shore. He was from  
24 Emory. He was the pediatric infectious disease expert, and we  
25 had Dr. Karotkin, who was the neonatologist from -- I believe

1 it was East Virginia Medical School.

2 On the defense side, this was not my expert but the  
3 USA's expert, and that was Dr. Wiesenfeld, and if you recall,  
4 he was the obstetric gynecologist who practices at Magee here  
5 in Pittsburgh and who has a special interest in maternal  
6 infections.

7 We had Dr. Coffin who testified yesterday. She is  
8 the pediatric infectious disease expert from Children's  
9 Hospital of Philadelphia, a professor of pediatrics,  
10 infectious disease from that institution, Dr. Ringer who was  
11 the neonatologist from Dartmouth and finally Dr. Boyd.  
12 Plaintiffs didn't bring a pathologist in to talk with you, to  
13 offer opinions. Dr. Boyd was the only pathologist that you  
14 heard from, and she told you that unequivocally, this child  
15 died from an E. coli infection and that there was not massive  
16 meconium, and we'll talk about that a little later.

17 Those are the experts. You have to determine which  
18 of those experts you find to be most credible. In order to do  
19 so, recall their qualifications, recall the manner in which  
20 they testified, and you determine who you find to be most  
21 credible. So let's talk about what the evidence was, what the  
22 claims are in this case.

23 So the very first claim here is given that the fetal  
24 heart tracing, that's the FHT, which intermittently showed a  
25 category two tracing, the presence of meconium, the need for a

1 vacuum extraction, the presence of a shoulder dystocia, the  
2 delivery room nurses should have called a pediatrician or  
3 advocated for the calling of a pediatrician to come to the  
4 delivery room. That's the plaintiffs' claim. All these  
5 things were present. A pediatrician should have been there,  
6 and the nurses should have either called individually or they  
7 should have advocated for Dr. Dumpe to do that.

8 Let's talk about the facts. The fetal heart tracing  
9 was reassuring and did not warrant the calling of a  
10 pediatrician. Where did you hear that from? Dr. Wiesenfeld  
11 told you that there was nothing there that was concerning that  
12 needed to have a pediatrician in attendance at the time of  
13 this delivery.

14 Although it is at the discretion of the obstetrician,  
15 the Heritage Valley policy does not indicate that a  
16 pediatrician should be present unless there is particulate  
17 meconium. There was no evidence of particulate meconium at  
18 any time prior to or during the delivery. You recall the  
19 testimony of Nurse Ash and her notes, thin meconium. You  
20 recall the testimony and notes of Nurse Hendershot, thin  
21 meconium. And then we have Dr. Dumpe's OR report which says  
22 nonparticulate meconium. There was no evidence of particulate  
23 meconium here for which a pediatrician needed to be called.

24 That's just what I mentioned. The American Academy  
25 of Pediatrics, the American Heart Association and the ACOG

1 standards do not require a pediatrician to be present when  
2 meconium is noted, but instead require a health care provider  
3 who is trained in neonatal resuscitation. Both  
4 Nurse Hendershot and Dr. Dumpe were NRP certified. That is  
5 what was required.

6 You heard that testimony from Dr. Wiesenfeld, from  
7 Dr. Ringer, from Dr. Dumpe. These policies comply. There was  
8 nothing in the policy that required a pediatrician to be  
9 present during this delivery.

10 The next claim, as we talked about before, the vacuum  
11 extraction. Here, the vacuum extraction was performed as a  
12 result of maternal fatigue. One of the reasons you would have  
13 a pediatrician is if you thought there was some injury or  
14 problem as a result of the vacuum extraction or that the baby  
15 had been deprived of oxygen for some period of time. There  
16 just wasn't that evidence in here. You didn't hear anything  
17 about that, that there was any evidence that there was a  
18 problem such that a pediatrician needed to be called for that.

19 We heard repeatedly about the shoulder dystocia, and  
20 Mr. Price has repeatedly put up the coding sheet to say, oh,  
21 there was shoulder dystocia, but if you look at Dr. Dumpe's  
22 note, Dr. Dumpe's note doesn't indicate there was shoulder  
23 dystocia. What the note indicates is that he had a concern  
24 for it, and he took measures to prevent it from occurring.  
25 There was no shoulder dystocia in this case. Therefore, there

1 was no reason to have a pediatrician present because of that.

2 The Apgar scores indicated a healthy baby. All of  
3 these health care providers told you that if there was an  
4 issue, they would have called a pediatrician. Why wouldn't  
5 they? That just doesn't make any sense, that if there was  
6 something going on, why would they not do that? The reason  
7 they didn't do it here is because this baby had an Apgar  
8 score -- five minute Apgar score of eight, which indicates a  
9 healthy baby.

10 In addition to that, that initial delivery assessment  
11 was completely normal. There was nothing going on there.  
12 There was no reason for a pediatrician to be called in at this  
13 point.

14 The next one, there was no need for resuscitation or  
15 any other intervention. The baby didn't need to be  
16 resuscitated. There wasn't anything going on.

17 The next allegation, if a pediatrician had been  
18 called, given Kendall's condition at birth and those risk  
19 factors which I just went through, fetal heart tracings,  
20 vacuum extraction, meconium, the alleged shoulder dystocia,  
21 the pediatrician would have initiated interventions which  
22 would have or should have included sending Kendall to the  
23 nursery for continuous observation, directing the nursing  
24 staff to closely monitor her, including frequent checking of  
25 pulse oximeters, vital signs, et cetera. That is the claim.



1           Here are the facts: All of the physicians agree,  
2 including plaintiffs' experts, that had a pediatrician been  
3 called, there would have been nothing for the pediatrician to  
4 do at that time. This was a healthy baby. There was no  
5 evidence of respiratory distress. There was nothing to  
6 resuscitate at that point. There was no issue.

7           Kendall did not require interventions beyond those  
8 that had already been provided by the neonatal trained  
9 resuscitation nurse. All agree that the initial assessment  
10 revealed that Kendall appeared to be a healthy baby. Now, we  
11 know that wasn't the case, and that became evident later, but  
12 at the time of birth, she appeared to be healthy.

13           There was no evidence of any respiratory distress or  
14 other symptoms which would have indicated the need for further  
15 intervention, including the administration of antibiotics. I  
16 think everyone agreed. You wouldn't give antibiotics at that  
17 time. There was no reason to do that.

18           And importantly, you heard Dr. Jones testify. She  
19 was asked, well, if you had been called, what would you have  
20 done? And what she told you is she wouldn't have done  
21 anything other than to say call me if there are any issues.  
22 That's what she would have done. She would not have directed  
23 the baby to be admitted to the nursery because there was no  
24 reason. There was nothing going on at that time that was  
25 concerning that required that close observation, pulse

1 oximetry, that type of thing. There just wasn't anything  
2 going on. She wouldn't have ordered any of that. She would  
3 not have started a sepsis workup because there's no reason to  
4 do so. She would not have prescribed the antibiotics at that  
5 time. You have to have an indication to do that, and at this  
6 point in time, there was no indication to do that.

7 Continuous pulse oximetry would not have been  
8 indicated or even intermittent pulse oximetry. You heard  
9 Dr. Ringer testify yesterday that isn't standard of care.  
10 They don't do that. When the baby is born and the baby  
11 appears healthy, the protocol is to allow the baby to bond  
12 with the parents. It isn't to bring them into the nursery,  
13 put them on a continuous pulse ox when there's no reason to do  
14 so. That's the way it works in these institutions. You don't  
15 do that. There's got to be a reason and there wasn't one  
16 here.

17 Given Kendall's condition at birth and the five  
18 minute Apgar, again, there was no reason why she should not  
19 have been permitted to stay in the delivery room and bond with  
20 her parents.

21 Here's the next claim: During the time that Kendall  
22 was in the delivery room with her parents and other family  
23 members following her birth and the initial assessment by  
24 Nurse Hendershot and the completion of the care by Dr. Dumpe  
25 that he provided to Carissa, she was having difficulty

1 breathing, she was grunting, flaring and retracting, crying  
2 continuously and was inconsolable, all of which should have  
3 warranted intervention.

4 Again, keep in mind that those are the claims by the  
5 parents. That's what they claim was occurring during this  
6 time frame.

7 Here are the facts. Nurse Hendershot, who is a  
8 neonatal-resuscitation trained, certified nurse with 30 years  
9 of experience was in the room to evaluate Carissa every 15  
10 minutes, and during those evaluations, she would have observed  
11 Kendall. This is a nurse who is very experienced. She was in  
12 there. She saw the baby.

13 If she saw anything, would there have been any reason  
14 for her not to do something about it? Why would she not do  
15 something about it? She was just going to ignore it? That  
16 doesn't make any sense. Carissa was Maria's only patient. It  
17 wasn't like she was running around from patient to patient  
18 that night. That wasn't the situation. It was just Carissa  
19 and Kendall.

20 If Kendall had any of the symptoms which the family  
21 claims were present, Nurse Hendershot would have, as she  
22 testified, taken Kendall to the nursery for an immediate  
23 evaluation. She would have called a physician. She would not  
24 have allowed Kendall to stay in that room and be passed around  
25 from family member to family member. That would not have

1 occurred.

2 The other thing to keep in mind, there were at least  
3 ten family members in that room at that time passing Kendall  
4 from family member to family member, and with the exception of  
5 Matt allegedly sending Tyler out to report that he was  
6 concerned that Kendall was crying or not breathing, no one  
7 came out to get a nurse or report their concerns regarding  
8 Kendall's condition. You'll recall, the nurses' station was  
9 directly across the hall. If there's an issue, you walk out  
10 in the hall with the baby. Look at this baby. Take care of  
11 this baby. That never occurred in this case.

12 When Maria took Kendall to the nursery, she did not  
13 observe any symptoms of respiratory distress. Again, I don't  
14 think, again, that there's any dispute that Maria was present  
15 and took this baby to the nursery. I know there's been  
16 testimony from Matt that it was he who went there, but all of  
17 the nursing staff testified that it was Maria who brought  
18 Kendall to the nursery that day.

19 Again, she would have had a chance to observe her.  
20 If she had seen any grunting, flaring and retracting,  
21 difficulty breathing, why would she not have done something  
22 about it? It doesn't again make any sense.

23 When Barb Hackney admitted Kendall to the nursery,  
24 she obtained vital signs which were normal. She provided eye  
25 drops. She gave an injection. In order to do that, you've

1 got to be looking at that baby. She is putting drops in her  
2 eyes. You could see at that point if Kendall were having  
3 respiratory issues, and again, why would Barb Hackney ignore  
4 those?

5           You may hear, oh it was a change of shift, she was in  
6 a hurry. Barb told you that if for one second she saw any  
7 issue with that baby, she would have done something. She  
8 would have done the full assessment. She would have taken  
9 action. Again, it doesn't make sense. What? They all  
10 ignored this baby, a baby in distress? I think you can see  
11 from the witnesses who took the stand here how this affected  
12 them, how caring and concerned they were. These nurses would  
13 not have done that.

14           The next allegation, Kendall's vital signs and pulse  
15 oximeter readings, if they had been taken while in the room  
16 with her parents, would have been abnormal and would have led  
17 to earlier intervention, including antibiotic administration,  
18 which would have given Kendall a chance of survival. That's  
19 the claim. That was Mr. Price's hypothetical that he was  
20 asking the doctor about yesterday, asking you to assume or  
21 asking the doctor to assume all these different facts which  
22 did not occur.

23           Here are the facts. Kendall's vital signs were  
24 stable at 7:00 a.m. Therefore, they would have been stable  
25 earlier, because when you have an infection like this, they

1 don't get better. They get worse. They won't wax and wane.  
2 It's a continual deterioration, so to argue that her vital  
3 signs would have shown something different earlier, i.e. that  
4 they would not have been normal does not make any sense given  
5 the way these infections progress.

6 Pulse oximetry again wasn't indicated, and it's not  
7 the standard of care. Did you hear anybody come in here and  
8 say the standard of care required the child to have pulse  
9 oximetry, and Dr. Ringer told you that is not standard of  
10 care.

11 If, as plaintiffs allege, Kendall's vital signs would  
12 have been unstable earlier and her pulse ox reduced, Kendall's  
13 chance for survival would have been worse and not have led to  
14 a better outcome, and I think Dr. Ringer explained that  
15 yesterday. That would have shown even more aggressive  
16 infection, further progression of infection, so it would not  
17 have made the situation better. It would have indicated that  
18 she was even in worse shape. So the outcome would not have  
19 been better. It would have been worse.

20 The next allegation, based upon the notes made by  
21 Janet Kincade, Dr. Jones was called at 7:20 a.m. but failed to  
22 arrive at the hospital until 8:00 a.m. That's the whole  
23 reason that Dr. Jones has been sitting in this courtroom for  
24 the past two weeks. No one claims, as we've talked about,  
25 that she did anything wrong here. The sole claim is if she

1 was called and she didn't come, then she is presumably  
2 negligent.

3 Here are the facts. The nurses who were present and  
4 aware of Kendall's condition at 7:20 a.m. were Nurses Barb  
5 Hackney and Jamie McCrory. That was who was there. Barb  
6 testified she didn't call Dr. Jones. Jamie McCrory testified  
7 she didn't call Dr. Jones. She called Dr. Heiple, the  
8 resident, because that was the protocol. She was to call the  
9 resident, and if you recall Dr. Jones saying if I was called,  
10 I would have said call the resident. Have the resident  
11 evaluate her. That's the protocol there.

12 So Barb didn't call. Jamie didn't call. Dr. Heiple  
13 didn't call Dr. Jones, as he knew she would have been arriving  
14 at 8:00 per her routine. He was also aware that she was on  
15 her way because he could see by consulting his iPad that she  
16 had already swiped into the parking lot so she was on her way  
17 up. I want to make a couple of comments about Dr. Heiple  
18 because I'm sure we're going to hear about this.

19 Dr. Heiple, during his deposition which was taken  
20 several years after these events, said that he thought that he  
21 got there somewhere around 8:00, but that doesn't make sense  
22 in terms of the timing, because we know that Jamie called him  
23 somewhere around 7:25 a.m. His testimony, I was down there  
24 pretty quickly thereafter, and Jamie basically said the same  
25 thing, so pretty quickly thereafter isn't 8:00. It might be

1 7:35, 7:40.

2 He also testified that Dr. Jones was there within  
3 about 15 minutes of the time that he got there, so if you put  
4 that all together, that places him there somewhere around  
5 7:40, 7:45. Dr. Jones was there then at 8:00.

6 So again, the timing makes the most sense that way.  
7 Dr. Jones testified that she was not called and that her first  
8 knowledge of Kendall was when she arrived in the nursery  
9 around 8:00 a.m.

10 And you recall Mr. Price showing you the clip of  
11 Jamie explaining that Dr. Jones wasn't happy about the fact  
12 that she hadn't been called because she walked in to a  
13 situation where there were two babies that needed to be  
14 transferred.

15 Nurse Kincade also took the stand and she testified I  
16 didn't call Dr. Jones. Nurse Kincade -- what did happen is  
17 that Nurse Kincade asked if the doctor had been called. She  
18 was told that a doctor was called, she said, around 7:20 a.m.  
19 She then asked what pediatrician was on call, and she was told  
20 it was Dr. Jones. She then made an assumption that it was  
21 Dr. Jones who was called, which we know did not happen.  
22 Dr. Jones was not called here.

23 The only way that the nurses or anyone else from  
24 Heritage Valley could have reached Dr. Jones was to call  
25 either her pager or her cell phone. She doesn't have a home



1 phone. There would have been no other way to reach her. And  
2 what do we know about that? The pager records reflect there  
3 were no calls made to Dr. Jones at 7:20 a.m. or any time  
4 thereafter about Kendall. There simply were no calls.

5 Her cell phone records reflect that there were no  
6 calls placed to her at 7:20 a.m. There's been some inquiry  
7 about, well, maybe they called the Heritage Valley pediatric  
8 office and that's how Jones became aware, but as Dr. Jones  
9 told you, if they had called the Heritage Valley Pediatrics  
10 office, Dr. Jones would have been paged. It would have been  
11 in those pager records, and the pager records show no pages.

12 I think the evidence abundantly establishes here that  
13 Dr. Jones was not called, that her first knowledge of these  
14 events occurred at 8:00 a.m. and again, there is no criticism  
15 of her in terms of what she did at that time.

16 The next allegation, since we know Kendall was  
17 infected at the time of birth, had a pediatrician evaluated  
18 her, she would have found abnormalities for which a workup  
19 would have been initiated and earlier treatment rendered which  
20 would have saved her. That's the claim.

21 The facts. This is a virulent, aggressive infection  
22 in newborns. The way this E. coli works, and you heard  
23 Dr. Ringer talk about that, Dr. Coffin talk about it, is that  
24 the baby initially appears well after delivery, as Kendall did  
25 in this case. An eight Apgar is a normal Apgar. Babies,

1       however, can only compensate for a certain amount of time, and  
2       in this case, we know that Kendall's body was doing everything  
3       it could to fight this infection.

4               We know that because her neutrophil count when those  
5       labs were obtained showed that she had basically used up all  
6       of those infection-fighting cells. She was doing -- her body  
7       was doing its very best to fight this infection. However,  
8       there comes a point in time where the infection has caused so  
9       much tissue damage that the baby just can't fight it anymore,  
10      and when that happens, the term that we have used is the baby  
11      kind of falls off the cliff. Everything starts to deteriorate  
12      very quickly, and that is exactly what happened in this case.

13             Earlier treatment with antibiotics would not have  
14      changed the outcome here and why do we say that? Why did  
15      Dr. Coffin say that? Because generally, and I think all the  
16      doctors agree that the general rule is the earlier you do  
17      something, including antibiotics, the better off it's going to  
18      be, but that's not the case when the infection has progressed  
19      to the point that they are already falling off the cliff.

20             At that point, there isn't anything further that can  
21      be done. Antibiotics are not going to change the course.  
22      Antibiotics don't work instantaneously. They do take some  
23      time to work, and when it is so far gone, they don't work, and  
24      that's what happened in this case. And with regard to that,  
25      there's simply no evidence that anything was going on here

1 before 7:25 a.m. When it was noted, the nurses immediately  
2 started action. Jamie McCrory had that baby under the oxy  
3 hood. She was monitoring her. Dr. Heiple was in there. He  
4 stayed with her. They were monitoring her. Dr. Jones was in  
5 there. They were extremely attentive. They did everything  
6 that they could, but this infection is what caused the  
7 problem, and it could not have been reversed earlier because  
8 the infection didn't manifest itself before 7:25 a.m., and  
9 when it did, it was too late.

10 The next claim, had Dr. Heiple called Dr. Jones when  
11 he initially evaluated Kendall or placed orders at that time,  
12 it would have resulted in earlier intervention. The facts,  
13 Dr. Heiple's actions were appropriate. When he arrived,  
14 Kendall was under that oxy hood. Her oxygen saturation had  
15 come up. Recall it was originally 81 percent. She was put in  
16 the oxy hood. She then came up to 94 percent, which is  
17 considered to be normal. That's a decent O2 saturation, and  
18 she appeared to him at that time, at least at that moment, to  
19 be stable.

20 And you recall that Jamie McCrory testified her note,  
21 that note from 7:25, was put together later, and she tried to  
22 include as much information as she could all in that note, but  
23 her testimony was that initially Kendall wasn't grunting,  
24 flaring and retracting. It wasn't until later when they began  
25 to intervene with her that she saw those things, and that

1 would be around the time that Dr. Jones was there, so when  
2 Dr. Heiple was there, he didn't see those types of things, so  
3 his actions, given the fact that he knew Dr. Jones was going  
4 to be there, were totally appropriate.

5 Next claim, earlier administration of antibiotics  
6 would have provided Kendall with a chance of survival. We  
7 already talked about that, but the antibiotics were ordered by  
8 Dr. Jones verbally sometime between her arrival at 8: -- her  
9 arrival and 8:20 a.m. and none of the plaintiffs' experts are  
10 critical. They didn't say she did anything wrong, she didn't  
11 timely do anything. There was no indication to order  
12 antibiotics before Dr. Jones ordered them. That's when  
13 symptoms started developing. She immediately did that.

14 Given the virulent, aggressive infection which had  
15 been present since before birth, as evidenced by that  
16 neutrophil count of three and Kendall's rapid decline,  
17 pulmonary hemorrhage, et cetera, earlier administration of  
18 antibiotics would not have changed the outcome in the case.

19 And I think, you know, that all of the experts agree  
20 that this infection had been there a while. There's no  
21 question about that. It had been there. It was there when  
22 she was born. It didn't manifest itself until later, but it  
23 had been there, and it had begun to take its toll, and at  
24 7:25, Kendall fell off the cliff. The infection just  
25 overwhelmed her, and she could no longer fight it, and that's

1 when the symptoms occurred.

2 We heard something yesterday about, well, those 7:00  
3 a.m. vitals were the same as the 7:25 a.m. vitals, they were  
4 both essentially normal. Therefore, no pulse ox had been done  
5 earlier. What triggered this entire series of events was  
6 Jamie McCrory noticing that Kendall was dusky, so there was a  
7 change. There was something different that occurred between  
8 7:00 and 7:25.

9 The next claim, the Heritage Valley policy for  
10 notification of a pediatrician to attend the delivery does not  
11 meet the acceptable standard of care as set forth by the  
12 American Academy of Pediatrics, ACOG and the American Heart  
13 Association. That was Dr. Karotkin's claim.

14 If you recall, he testified that in his institution,  
15 they require a pediatrician to be present any time there's  
16 meconium. He didn't agree with the Heritage Valley policy and  
17 he thought it deviated from the standard of care.

18 The facts, the American Association of -- sorry, the  
19 American Academy of Pediatrics, ACOG and the AHA guidelines  
20 only require that an individual trained in neonatal  
21 resuscitation be present at delivery when meconium is noted.  
22 The Heritage Valley policy actually goes above that and  
23 requires that or indicates that a pediatrician should be  
24 called when particulate meconium is present.

25 So the Heritage Valley policy does not deviate from

1 the standard of care. You heard that from Dr. Wiesenfeld who  
2 is up here at Magee, you heard that from Dr. Ringer, you heard  
3 that from Dr. Dumpe. The policy was in compliance. There was  
4 nothing wrong with the policy.

5 The next allegation, Kendall died as a result of  
6 massive meconium aspiration as noted by Dr. Min in his autopsy  
7 report, or in the alternative, the massive meconium aspiration  
8 contributed to her death and inability to fight the E. coli  
9 infection. That's what we have been debating here. What  
10 effect, if any, did the meconium have, and you heard from  
11 Dr. Boyd that clearly there was meconium present. Dr. Boyd  
12 found that when she did her review. Dr. Min found that when  
13 he did his autopsy. There's no question about that.

14 But the cause of death wasn't massive meconium  
15 aspiration. The cause of death was E. coli sepsis. Dr. Min  
16 said that. If you remember that portion of the autopsy  
17 report, not the three anatomic diagnoses, but the actual cause  
18 of death was E. coli sepsis and bronchopneumonia. That was  
19 what caused Kendall's death.

20 We've heard lots of testimony and questions about,  
21 well, you know, if you have this meconium, does it impair your  
22 ability to fight this infection because you can't exchange  
23 gas. We've heard a lot of testimony to that regard. We heard  
24 testimony or questions, well, this drop in the pH, was that as  
25 a result of the meconium, and Dr. Coffin and the others told

1 you no, this was the result of the E. coli infection.

2 Dr. Min testified that massive meconium aspiration  
3 was a clinical nonpathological finding and the cause of death  
4 was E. coli sepsis and bronchopneumonia, and again, he didn't  
5 change this report. It was a clinical diagnosis. He told you  
6 he could not find evidence of massive meconium. There was  
7 meconium there, no question about that. No one is debating  
8 that, but that was not the cause of Kendall's death.

9 In order to accept plaintiffs' version of the events,  
10 these hypotheticals that you heard and all the other testimony  
11 that you've heard, there are certain things that you have to  
12 accept and let's just talk about that.

13 You have to accept that there was particulate  
14 meconium present at delivery or before delivery that required  
15 a pediatrician to be present here.

16 You have to accept that there was a shoulder  
17 dystocia. We have no evidence of that.

18 You have to accept that there was injury caused by  
19 that vacuum extraction for which someone should have been  
20 called.

21 You have to accept that Maria Hendershot's Apgar  
22 scores were incorrect, that she didn't know how to do them and  
23 they weren't done correctly, that this was not a healthy  
24 appearing baby at that time.

25 You have to accept that Maria Hendershot's initial

1 neonatal evaluation in the delivery room was not accurate,  
2 that the baby wasn't normal at that time.

3 And this one is perhaps the most troubling. You have  
4 to accept that Maria lied about being in the delivery room  
5 every 15 minutes from 6:00 a.m. to 7:00 a.m. to evaluate  
6 Carissa during which time she observed Kendall. She would  
7 have had to lie. She documented in the chart that she was in  
8 there. Not only would she have lied, she also would have  
9 falsified medical records. You have to accept that Maria was  
10 a liar and she falsified medical records.

11 And if Maria was in the room, then she was  
12 incompetent, because she failed to hear the grunting, she  
13 failed to observe flaring and retraction. If Maria was in the  
14 room and she observed what the family claims was occurring,  
15 the flaring, grunting, then Maria just simply chose to ignore  
16 it. Why would she do that?

17 You also have to accept the testimony from Matt or I  
18 think it was actually Kylee who said Tyler was actually sent  
19 out to say that the baby was having breathing problems but he  
20 got confused or mixed up and told the nurse that she was  
21 crying, that Matt brought Kendall to the nursery because of  
22 concerns regarding her breathing, and Maria, again, either  
23 failed to notice them, she was incompetent or she ignored it.

24 Barb Hackney failed to observe the breathing  
25 difficulties including the grunting, flaring and retracting or



1 she ignored them, and you have to accept that Dr. Jones was  
2 called at 7:20 but didn't choose to come in until 8:00 a.m.  
3 That she was cavalier, oh, I'm not going in.

4 You had a chance to observe these witnesses on the  
5 stand. Do you believe that they lied? Do you believe that  
6 they falsified the medical records? That's what you have to  
7 believe in order to accept plaintiffs' version of this case.

8 While I don't think you will get to damages in the  
9 case, if you disagree and you believe that damages are  
10 warranted, I just want to make a few comments about that.

11 You heard testimony from Dr. Kenkel who was the  
12 economist who came in and gave you a range of damages. Recall  
13 that those -- that range of damages was based upon government  
14 statistics, because no one knows what the future would have  
15 held for Kendall. We don't know what she would have done,  
16 whether she would have worked, what she would have done, how  
17 much she would have made.

18 Those are simply statistics because we don't have a  
19 crystal ball, but keep in mind that if you believe damages are  
20 awarded, they are meant to compensate.

21 When you go back and you begin your deliberations,  
22 you are going to have to assess were these witnesses credible,  
23 who do you find to be credible, you know, does the story make  
24 sense, and the way you do that is to simply use your good  
25 common sense, and that's why you were all chosen to be jurors

1 in this case.

2 This case is clearly tragic. I don't think anybody  
3 feels anything but great sympathy for Carissa and Matt. The  
4 loss of a child is horrific. You saw these health care  
5 providers. Dr. Jones took the stand and cried. This was  
6 terrible for her. This was terrible for all of the health  
7 care providers. Terrible for these parents, no one disputes  
8 that, and the fact that we are here is not meant to in any way  
9 belittle what this family has gone through, but we are here  
10 because Maria Hendershot didn't cause this. Dr. Jones didn't  
11 cause this. Dr. Heiple didn't cause this. Jamie McCrory,  
12 Barb Hackney, they didn't cause this.

13 The cause of Kendall's death was an overwhelming  
14 infection. You heard Carissa testify that she was concerned  
15 that she might have done something. Carissa did nothing. No  
16 person here is responsible for this. It is an infection.  
17 They happen. This one didn't manifest itself until it was too  
18 far along for anything to be done.

19 When you go back and you begin your deliberations  
20 after the judge gives you her instructions, she is going to  
21 give you a verdict slip, and if we can put that up. This is  
22 the first page of the verdict slip, and this is going to help  
23 you to go through your deliberations, because there are  
24 certain questions that you are going to have to answer, and  
25 the very first question on this, and I'm going to just read it

1 to you, "Do you find the conduct of any of the defendant  
2 doctors or other medical providers fell below the applicable  
3 standard of care? In other words, were the defendants  
4 negligent," and I would ask that you mark no for Heritage  
5 Valley Beaver and no for Dr. Hilary Jones. Thank you very  
6 much.

7 THE COURT: Thank you, Ms. Koczan. Ladies and  
8 gentlemen of the jury, before we hear our next closing  
9 argument, and to give Mr. Colville a couple minutes to set up,  
10 if any of you want to stand at this time, just to stretch.

11 Again, ladies and gentlemen, just as you did for  
12 Ms. Koczan, I'd like you to give your kind attention to  
13 Mr. Colville and recall the limiting instruction I provided  
14 you vis-a-vis closing arguments. Mr. Colville, you can  
15 proceed.

16 MR. COLVILLE: May it please the court, counsel,  
17 ladies and gentlemen of the jury? Let me begin by indicating  
18 that the government concurs wholeheartedly with the analysis  
19 and the facts that were just described by Ms. Koczan in her  
20 opening.

21 When I last talked to you, I mentioned to you what  
22 the claims against the United States in this case were. I  
23 indicated there were two claims. First claim was that  
24 plaintiff believed that the delivery of Kendall needed to be  
25 accomplished earlier, in this case, because of fetal

1 monitoring strip indicators.

2 The second was that they believed Dr. Dumpe was  
3 negligent for not having phoned or having a pediatrician  
4 present at the delivery.

5 The first claim has gone away. It is not before you  
6 and you will not be deciding it. You may recall when I  
7 cross-examined Dr. Zamore, one of the first questions I asked  
8 him was please tell me exactly when you think the baby should  
9 have been delivered earlier based upon the strips, and you may  
10 recall that at that point, he said, well, I've changed my  
11 mind. I'm not going through with that.

12 It's inexplicable. He didn't explain, other than  
13 saying I've changed my mind. The facts hadn't changed. The  
14 same facts applied when he prepared his report. He indicated  
15 that he was -- he intended to prepare an amended report, but  
16 he said he reserved the right to, he never did, but I just  
17 want -- it's a strange occurrence, and the expert, and it  
18 appears plaintiffs themselves have walked away from this  
19 claim, so that is not going to be before you.

20 The issue as to whether or not a pediatrician should  
21 be present is, and the government's position in this case is  
22 it is not supported by the medicine or the facts. I told you  
23 in my opening, our defense in this case is pretty  
24 straightforward.

25 The first is meconium wasn't in play here. It did

1 not cause the death of Kendall. Neither did the,  
2 quote-unquote, "shoulder dystocia" which we argue did not  
3 occur, nor did the vacuum extraction, nor did the monitoring  
4 strips.

5 As I told you in my opening, these are red herrings.  
6 These are shiny little objects that are distracting you from  
7 the issue at hand. In this case, and again part of our  
8 defense is, it's the E. coli infection, an insidious disease  
9 in this case. It was insidious because Kendall had this  
10 infection in utero. She had it when she was delivered and  
11 born.

12 The infection continued to progress at the same time  
13 that people who were there charged with the care of her could  
14 see no symptoms. No symptoms of respiratory distress or  
15 infection for them to act upon. That is the insidiousness of  
16 it. It's a virulent disease that can be deadly, particularly  
17 in newborn babies, and yet, even though it progressed, you  
18 couldn't tell, you couldn't see it, you couldn't do anything  
19 about it. You wouldn't do anything about it.

20 The other prong of our defense is Dr. Dumpe is  
21 competent. He's experienced. He knew what he was doing and  
22 he did everything that should have been done in this case for  
23 Kendall. He managed the prenatal care of Kendall  
24 appropriately. He managed the labor, the delivery, and when  
25 the baby was delivered, this was delivered as a healthy baby.

1           And as you'll see in the document a thousand times,  
2     delivery assessment, it is the snapshot summary of the  
3     government's defense. This baby had Apgar scores that were  
4     all agreed to be normal. The evaluation found no  
5     abnormalities. The vitals that were taken at 7:00, once the  
6     baby was taken back to the nursery, were normal. Every expert  
7     testified this was a healthy baby.

8           Dr. Dumpe did his job that day. He delivered a  
9     healthy baby. There were no symptoms for him to follow up on  
10    and there was no indications that he should have seen that  
11    this E. coli infection was going to progress further, and it  
12    had no symptoms, at least on his watch.

13          Dr. Jones testified, and she is the pediatrician in  
14    this case. She is the one who wasn't called. She wasn't  
15    called because the standard of care doesn't require it in this  
16    case. We'll get into that in a little bit, but had Dr. Jones  
17    been called in this case by Dr. Dumpe to attend the delivery,  
18    Dr. Jones was asked point blank what would you have done. And  
19    her answer was I wouldn't have done anything differently than  
20    what was already done. There was nothing to do. There were  
21    no symptoms.

22          Again, the insidiousness of this infection, it's  
23    progressing, but Dr. Jones wouldn't have been able to see it.  
24    That's what's documented on the delivery assessment. That's  
25    what tells you it was undetectable. Dr. Jones wouldn't have

1 worked it up. She wouldn't have monitored it. She would have  
2 left and said if you see any symptoms, call me, I'll be back,  
3 but more importantly, she wouldn't have prescribed antibiotics  
4 at that point.

5 That's what plaintiffs claim should have happened.  
6 They claim earlier treatment would have resulted in a better  
7 outcome. The problem is, there was no reason to treat. There  
8 were no symptoms to treat. All the experts, plaintiffs and  
9 defendants, testified healthy baby. All the experts,  
10 plaintiffs and defendants, testified because there was a  
11 healthy baby, you don't treat with antibiotics.

12 The plaintiffs again, I suggest it's a red herring or  
13 distraction from the issue, point to a number of,  
14 quote-unquote, "risks": The meconium, the vacuum extraction,  
15 the monitoring strips and the shoulder dystocia. These are  
16 specious contentions and they are not supported by the facts.

17 Let's go through a couple of them. The shoulder  
18 dystocia, Ms. Koczan touched every base on them, and again, I  
19 wholeheartedly concur with her analysis on them, but the  
20 shoulder dystocia didn't happen period. It didn't happen.  
21 Look at Dr. Dumpe's operative report when you deliberate. He  
22 indicates that he employed the prophylactic McRoberts  
23 Maneuver.

24 The McRoberts Maneuver is a maneuver used by  
25 obstetricians when there is shoulder dystocia. Prophylactic

1 means he did something to prevent the shoulder dystocia from  
2 happening. He has testified and Nurse Hendershot who was  
3 there testified it did not happen. And yet, plaintiffs'  
4 counsel continues to pose hypotheticals and make assumptions  
5 that it did, knowing that the testimony and the records  
6 indicate otherwise.

7           It didn't happen. Not only did it not happen, there  
8 weren't any complications that arose from it. The suggestion  
9 is a pediatrician needed to be there because, if this  
10 prophylactic McRoberts Maneuver was used, a pediatrician needs  
11 to be there to respond to something. Well, there were no  
12 complications that arose from it, because there was no  
13 shoulder dystocia. Start with that.

14           And that is why Dr. Wiesenfeld and Dr. Ringer  
15 testified that the standard of care in this case was met.  
16 They testified that the standard of care in this situation  
17 only required somebody be certified in neonatal resuscitation,  
18 and we know that Dr. Dumpe was and we know that  
19 Nurse Hendershot was. Both Dr. Wiesenfeld and Dr. Ringer said  
20 the standard of care was met.

21           The fetal heart rate strips, again, this is where  
22 Dr. Zamore walks away from that claim. That is what he based  
23 his claim the baby should have been delivered earlier, and I  
24 suspect he realized that he had overstepped where he tried to  
25 say that the strips were nonreassuring and required an earlier



1 delivery. They didn't. Dr. Wiesenfeld indicated there was no  
2 need to deliver this baby early. Dr. Wiesenfeld is an OB-GYN.  
3 He's an expert. He has a subspecialty of reproductive  
4 infectious disease. He is trained to read these strips. He  
5 reads these strips in his work. He delivers over 100 babies a  
6 year and has for the past decade.

7 He reviewed the entire strip and he testified that  
8 the strips were reassuring. He testified there was no  
9 reason -- forget about an early delivery, but there was no  
10 reason for a pediatrician to have been called at the delivery  
11 because of the strips. He testified the standard of care was  
12 met by Dr. Dumpe. He wouldn't have done anything different  
13 than Dr. Dumpe.

14 Dr. Ringer, the other expert, also said the standard  
15 of care was met and that a pediatrician was not needed at the  
16 delivery based upon the fetal monitoring strips.

17 Plaintiffs' expert Dr. Karotkin, he testified that  
18 the strips in his mind needed the pediatrician to be present.  
19 Think about Dr. Karotkin though. There's a couple things. He  
20 testified he didn't read the strips. He didn't read the  
21 strips, and yet he's testified that because of the strips, a  
22 pediatrician needed to be there, that Baby Kendall was in  
23 jeopardy or was at risk. He didn't read the strips. He's not  
24 trained in reading the strips. He doesn't read the strips in  
25 his daily work.

1           He agreed when I asked if Dr. Dumpe had more  
2     experience in reading the strips than he did. He said yes.  
3     He agreed when I said Dr. Dumpe was more of an expert in  
4     reading the strips than him. He agreed.

5           Like these other risks, the meconium, there was no  
6     complication that arose out of these strips. There was  
7     nothing for a pediatrician, if a pediatrician like Dr. Jones  
8     had been called to be present, to respond to anything relating  
9     to the strips. The baby was born healthy.

10          Same for the vacuum extraction. Ms. Koczan  
11     appropriately pointed out, one, it's a common procedure. It  
12     was used in this case the very last minute because Carissa had  
13     exhausted and it was used to gently pull the baby out with her  
14     pushing to assist her. You may recall this replaced the  
15     common use of forceps. And the plaintiffs argue that this is  
16     an operative procedure. Because it's an operative procedure,  
17     the pediatrician should be present.

18          Dr. Ringer, Dr. Wiesenfeld both disagree with it.  
19     They both told you the appropriate guidelines do not require  
20     that, the pediatricians are not needed, are not required to be  
21     present. Again, all that needs to be there is somebody  
22     certified in neonatal resuscitation. The fear is the baby  
23     gets tangled in the umbilical cord, there's asphyxiation, you  
24     need somebody to resuscitate the baby, if there was a head  
25     injury. Those types of risks did not present themselves, like

1 they didn't in the meconium, in the fetal strips.

2 The standard of care was met. Dr. Ringer and  
3 Dr. Wiesenfeld testified to that.

4 Meconium. What hasn't been said about meconium in  
5 this case? You probably know more about meconium than you  
6 care to know. So do I, but a couple things we can agree on, I  
7 think. Meconium is common. This is not particular to Carissa  
8 and Kendall. This happens in 20 percent of the cases. One  
9 out of five have meconium present somewhere in the birth. It  
10 was not caused by Dr. Dumpe. This happened and it happens  
11 mostly in women who take their babies to term, which in this  
12 case, it was.

13 The other thing we know, and it is beyond dispute and  
14 there's no evidence to contradict it, is the meconium in this  
15 case was nonparticulate. The plaintiffs have provided no  
16 evidence, zero, that there was particulate meconium present.  
17 It's important, but it sort of isn't, given what  
18 Dr. Wiesenfeld testified to, but it's important. It was  
19 important early on when we were talking about the policies,  
20 the hospital's policy.

21 In that hospital policy, OBs who are presented with  
22 babies who have presented with meconium, like Baby Kendall in  
23 this case, are required under the policy to bring a  
24 pediatrician in when there is particulate meconium.

25 Now, there wasn't particulate meconium in this case.

1 Dr. Dumpe has the discretion under the policy when it's not  
2 particulate to not bring a pediatrician in. Dr. Wiesenfeld  
3 testified the standard of care doesn't require a pediatrician.  
4 It only requires a certified neonatal resuscitation personnel.  
5 Dr. Dumpe complied with the policy. He complied with the  
6 standard of care. He was not required to have a pediatrician  
7 present, and as Dr. Jones testified, even if she had been  
8 present, there was nothing that she was going to do with that  
9 meconium. It had been managed. It had been observed, noted  
10 throughout the labor and dealt with, and it posed no problem  
11 or risk that a pediatrician needed to address.

12 The massive aspiration. There was no massive  
13 aspiration. There was no massive aspiration of meconium, yet  
14 plaintiffs' counsel continues to pose questions and throw it  
15 out as though it did. The massive aspiration of meconium,  
16 where that came from is in the autopsy report that Dr. Min  
17 prepared, and in it, it's one of the three findings.

18 Dr. Min testified at his deposition and he testified  
19 here consistent with his deposition that the use of the word  
20 massive aspiration of meconium was a mistake. That's not been  
21 challenged by plaintiff as being wrong, as being incorrect,  
22 being a lie, but Dr. Min testified he made a mistake. He  
23 should not have used the word massive. He said during his  
24 deposition, he said during his testimony I got that from a  
25 review of the clinical record.

1           What that means is he said I went back and looked at  
2     the medical records and based upon my review of the medical  
3     records, that's where I got it. He didn't speak to any of the  
4     treating -- he didn't speak to Dr. Dumpe, he didn't speak to  
5     Nurse Hendershot, both of whom were there and actually saw it.  
6     They are the only two that were there and saw it. They were  
7     really the only two that could have said exactly what happened  
8     and put it on paper, but anyway, Dr. Min says he wrote  
9     massive, he shouldn't have. He made a mistake.

10           Plaintiffs' counsel knows that and has known it for a  
11    long time, and yet assumptions, hypotheticals assuming a  
12    massive aspiration of meconium have been asserted. The truth  
13    of the matter is Dr. Min said when he went back and looked  
14    back at it, when he went back and looked at the slides, he  
15    couldn't tell it was meconium, and Dr. Boyd, a renown  
16    pathologist from Boston Children's, she definitively testified  
17    that, based upon her review of the slides, same slides that  
18    they were all looking at, there was not a massive aspiration  
19    of meconium. It was neutrophils. It was lymphocytes. The  
20    baby's lungs were being filled with cells that were being  
21    produced and expelled by Kendall's body to fight the  
22    pneumonia.

23           As Ms. Koczan noted, the neutrophils were down to  
24    three. She was running on empty. This infection was  
25    advanced. It was subclinical, but it was advanced. When I

1 say "subclinical," what I mean is it was progressing. It was  
2 building. It was taking its toll, but it had no symptoms from  
3 the outside looking in. You couldn't tell, but if you had  
4 been in there, you could have told them.

5 This meconium is a boogeyman. Plaintiffs' counsel is  
6 using it as a boogeyman almost to the exclusion of actually  
7 talking about the E. coli infection, the real cause of the  
8 death of Kendall.

9 Wrapping up all these risks, meconium, strips, all of  
10 it, none of them had complications. None of them resulted in  
11 anybody having to do anything other than what was done which  
12 resulted in the birth of a healthy baby.

13 I want to talk a little bit about the short time  
14 Dr. Dumpe spent after the birth in the delivery room.  
15 Dr. Dumpe's authored report is a lot like the delivery  
16 assessment, and when you deliberate, I would like you to look  
17 at it. It's Exhibit 2 pages 3 and 4. This is essentially the  
18 narrative of what happened during the delivery and it is  
19 consistent, wholly consistent with the delivery assessment.  
20 It's just as important.

21 There is also a medical record that you'll see at  
22 Exhibit 2 page 10. This is a medical note of the delivery  
23 that Dr. Dumpe wrote. So what happens is, the baby is  
24 delivered at 5:20. Gets the baby out, suctions the little  
25 meconium in the mouth, transfers over to the nurses where they

1 attend, clean, suction a little bit more, ultimately swaddle  
2 the baby, clean the baby off, hand it off to mom.

3 While all that is happening, Dr. Dumpe is tending to  
4 Carissa who had an episiotomy. He goes back, sutures her up,  
5 takes about 20 minutes. He's there from 5:20 to 5:45. At  
6 5:45, he's gone. It's probably a little bit before 5:45,  
7 because, as you'll see from the medical record that I made  
8 reference to, Exhibit 2 page 10, he handwrites a note. It's  
9 just a short little note. Talks about the Apgar scores.  
10 Talks about the vacuum extraction. It's timed. The time he  
11 wrote the note is 5:45.

12 After he wrote that note, he then goes and dictates  
13 the operative report. As we looked at yesterday, the  
14 operative report is timed 5:53. So Dr. Dumpe is there after  
15 delivery from 5:20 at delivery to 5:45. Then he leaves the  
16 room and he's done.

17 I make this point because, like the delivery  
18 assessment, an operative report makes no mention whatsoever of  
19 any sign or symptom of respiratory distress, any sign or  
20 symptom of an infection. That note was written in realtime,  
21 and like the questions Ms. Koczan had about why would they  
22 make this up, what motive would Dr. Dumpe have to exclude  
23 having seen a sign or a symptom of an infection or respiratory  
24 distress at the time? None.

25 He's dedicated his life to delivering babies, to

1 taking care of babies. Just like Nurse Hendershot has. Just  
2 like Nurse Hackney, McCrory. This is what they do. You see a  
3 symptom, you see a sign, you act, and if you don't act, you  
4 get somebody that can act, but the point is, those records  
5 make no mention of it.

6 The same goes -- I'm not here to defend the nurses or  
7 any of the people. After Dr. Dumpe leaves, you know, his role  
8 was completed. The argument is, well, there was grunting and  
9 flaring while the family held the baby and there was some  
10 concern about it, and for all the reasons Ms. Koczan noted,  
11 that story doesn't make sense.

12 I can't explain why that's the story. I can't. I'm  
13 not going to even try, but as Ms. Koczan said, if you are  
14 there for over an hour and you have a baby that you have some  
15 concerns about, and they are not getting the attention they  
16 want, open the door and walk ten feet and say I think there's  
17 something wrong.

18 What else doesn't jibe is the pictures we have is  
19 what you would expect. You have the baby being passed around.  
20 It's swaddled. Smiling. It's a common experience.

21 Matthew said he walked the baby down to the nursery.  
22 Nurse Hendershot has disagreement with that. Said it's not  
23 policy, but where was the conversation with Nurse Hendershot  
24 saying, on that walk down, where were you, or here, look at  
25 this baby. It's grunting, it's flaring. What do you think



1 about this?

2 Does anyone really believe that Nurse Hendershot  
3 walked with Matt with the baby grunting and flaring, dropped  
4 it off at the nursery and made no comment, no note in any  
5 record, report or did nothing in response to a baby grunting  
6 for the first time, which is clearly a symptom of respiratory  
7 distress, which she would be aware of, which she said she  
8 would have noted.

9 Ms. Koczan's question about what you have to believe  
10 to believe the story, you've got to believe a lot. You've got  
11 to believe Dr. Dumpe didn't record symptoms he saw or observed  
12 or was told about. You have to believe Nurse Hendershot  
13 ignored, didn't document, didn't act, Nurse Hackney,  
14 Nurse McCrory, and the documents were created with false  
15 information. It's not believable. It isn't.

16 You heard from Dr. Wiesenfeld, the expert who  
17 testified on behalf of the United States. Prominent OB-GYN  
18 physician from West Penn, and he testified unequivocally that  
19 Dr. Dumpe did everything he should have done and he met the  
20 standard of care. He testified earlier delivery was not  
21 appropriate nor was it indicated, and the presence of a  
22 pediatrician was not indicated or needed here.

23 He testified unequivocally the standard of care does  
24 not require a pediatrician under the circumstances presented  
25 in this case. His testimony affirmed my statements that the

1 plaintiffs' emphasis and focus on meconium is misplaced and is  
2 misleading. Dr. Dumpe managed the meconium appropriately. He  
3 managed all facets of this labor and delivery appropriately.

4 Dr. Dumpe met the standard of care. The plaintiffs'  
5 desire in this case to have you focus on meconium or the side  
6 issues, rather than the E. coli, I would suggest is a tactic.  
7 You shouldn't take the bait. Meconium was not the cause of  
8 the death. Shoulder dystocia was not the cause. E. coli was.

9 I have other comments that I was going to tell you,  
10 but Ms. Koczan touched all the bases, and the last base she  
11 touched is true. This case is sad. It's tragic. It's sad  
12 because Kendall died because of an insidious disease. The  
13 whole time people were there that could have helped her but  
14 didn't know it. It didn't show itself. There weren't  
15 symptoms to attack or to fight against. Her body tried but it  
16 couldn't do it. The infection overwhelmed her.

17 Dr. Dumpe, like the nurses and the staff, played no  
18 role in her passing. He appropriately managed the labor and  
19 delivery. Dr. Kevin Dumpe is an experienced, skilled OB-GYN.  
20 He's a good man. He delivered a healthy baby here, a baby  
21 that showed no signs or symptoms that ultimately would take  
22 Kendall.

23 If you recognize this reality, your decision with  
24 regard to Dr. Dumpe is pretty straightforward. Ms. Koczan  
25 showed you the verdict slip. The first question asked whether

1 or not you believe the United States, in this case,  
2 represented by Dr. Dumpe's actions, was negligent, and I would  
3 suggest that the proper answer in this case is no.

4 On behalf of Dr. Dumpe, Mr. O'Connor, myself, I thank  
5 you for your time, certainly your patience and the  
6 attentiveness which you've given this. Your service as jurors  
7 is very meaningful and we thank you.

8 THE COURT: Thank you, Mr. Colville, for those  
9 arguments on behalf of the United States. Once again, ladies  
10 and gentlemen, if you want to just stretch a little bit, and  
11 we'll give Mr. Price a couple of minutes to set up, and we'll  
12 hear his closing argument. Mr. Price, are you ready to  
13 proceed?

14 MR. PRICE: Yes.

15 THE COURT: Ladies and gentlemen of the jury, we'll  
16 now hear the closing argument on behalf of the plaintiffs by  
17 Mr. Price. Once again, give him your kind attention as you've  
18 done to prior counsel. Also once again, recall the  
19 instructions I gave to you about closing arguments.  
20 Mr. Price, you can proceed.

21 MR. PRICE: May it please the court, counsel? 5:20  
22 a.m., a healthy, healthy baby was born. In six hours, this  
23 baby was dead and yet nobody could do anything. Nobody did  
24 anything. Why did this baby die in six hours and nobody could  
25 do anything?

1           Now, if you'll remember on Monday, last Monday when I  
2       gave my opening, I said -- this is the only part I'm going to  
3       read. I said, "Ladies and gentlemen, I think we're going to  
4       unseal and discover what happened or didn't happen in the  
5       hours leading up to the birth, the six hours of life and in  
6       the years after. I suspect that you will see the inner  
7       workings of the health care system and how they cared for, and  
8       in instances, didn't care for the lives in the community.  
9       Together, we will see how they handled this life in this  
10      system."

11           I think, boy, did we see that. We saw a lot of it,  
12      and I'm going to tell you what we saw, because we start out  
13      here, this is before anything happened, Carissa and Matt in  
14      the laboring room, and they are like any other young couple or  
15      any other couple expecting a birth, and they are also like a  
16      lot of other people in our health care system. They're  
17      sitting in a bed. Hospital beds. Everybody has to go to a  
18      hospital. Everybody has to lay in a bed at some point during  
19      their lifetime, and in doing so, in lying in a bed, just like  
20      Carissa was with Matt by her side, whenever they want or need  
21      medical care, they hope that the system will provide for them  
22      as it's supposed to.

23           And you might ask, well, what does the system provide  
24      for you in health care? What do you, as the community, say,  
25      hey, look, we have to have standards. We have to have rules.

1 How do you say, if my grandmother goes into the hospital or I  
2 have to take my elderly mother to the hospital or my grandson,  
3 what are the rules? What are the standards that this case can  
4 show us that can apply to the community, and what it comes  
5 down to is this: Trust.

6 Matt and Carissa came to this hospital and all they  
7 asked for was trust. They asked the doctors. They trusted  
8 the doctors. They trusted the health care, and in exchange,  
9 the doctors and nurses had to follow the rules.

10 Now, the reason why I pointed out this was that this  
11 is in their system. This is the system that they have to live  
12 by. I talked to everybody about these, and I know you've seen  
13 these ad nauseam. Rule one, rule two and rule three. I don't  
14 have to go over them again, because I know that you know them,  
15 but those are the rules that apply in this case, and those are  
16 the rules that the doctors must be judged by and the nurses  
17 and the hospital, and it's your choice. I can't tell you what  
18 to do or what not to do.

19 You are free to choose to enforce these rules or not.  
20 I know there's been argument, but it's your choice. We can't  
21 tell you what to do. The judge can't tell you what to do. We  
22 can ask, but in the end, it's your choice as to whether or not  
23 you think these rules apply or don't apply.

24 Now, how are you going to apply these rules? Well,  
25 I'm going to talk to you in a minute about how these rules

1 apply in this case and what you saw, just so we can go over  
2 that, but you are going to apply these rules through the  
3 verdict slip. This is how you make a determination as to  
4 whether or not the rules apply.

5 Now, I know that you have been shown it and I'm  
6 briefly going to go over it so you can understand a little bit  
7 about what your job is going to be. You are going to be asked  
8 four questions. So the first question is: Do you believe  
9 that any of these parties were negligent? And you are going  
10 to have to answer that question. Number one, the  
11 United States of America for the conduct of Dr. Dumpe. Second  
12 question is Heritage Valley and that's Nurse Hendershot,  
13 Dr. Heiple and Nurse McCrory and the third question is  
14 Dr. Jones.

15 Now, after that, the next question you are being  
16 asked is: Was the defendant's negligence a factual cause. I  
17 know we'll get to that, and then the third question, the  
18 percentage of fault, and the fourth question, the damages.

19 Now I'll be more specific. We'll go back over that,  
20 but that's going to be your task when you go into the jury  
21 room to answer these questions.

22 Now, the first question is negligence, and we talked  
23 about negligence, and you heard the experts come up here, and  
24 I know that you heard Dr. Karotkin talk about it's what a  
25 reasonable doctor would do. I think everybody agreed to that.

1 What's reasonable in this case, and again, they can tell you  
2 what's their opinion, but you are the ones who are going to  
3 determine what the standard is, what is reasonable care.

4 So safety rule one, if a baby is at risk, a  
5 pediatrician must be present. Why did I come up with that?  
6 It's with regard to Dr. Dumpe.

7 Now, why do I say that? Because it was a complicated  
8 delivery and no pediatrician was called. Is there a dispute  
9 about it being a complicated delivery? Yes. You heard  
10 Mr. Colville just simply say shoulder dystocia didn't happen,  
11 didn't happen. It didn't happen. But he can't tell you that.  
12 You are the one that's going to have to decide that.

13 Fetal strips category plus two, arrest of descent,  
14 operative delivery, shoulder dystocia, McRoberts Maneuver,  
15 meconium.

16 Why did I come up with this issue of shoulder  
17 dystocia? You kept hearing me ask all the obstetricians that  
18 came here and testified even for the defense, and I said to  
19 them, in Dr. Dumpe's operative note, it says he used the  
20 McRoberts Maneuver. When do you use the McRoberts Maneuver?  
21 They said you use the McRoberts when you have a shoulder  
22 dystocia.

23 So was a McRoberts done or not? Well, there's a  
24 billing record for it, and again, this is for you to decide.  
25 Now, the importance of this issue is you heard Dr. Ringer

1 testify yesterday, if a shoulder dystocia occurs, pediatrician  
2 is present. Pediatrician is there. Every shoulder dystocia,  
3 a pediatrician is there. Was there one here? No.

4 Operative delivery, there was an arrest of descent.  
5 You heard Dr. Zamore talk about that, Dr. Shore, and then this  
6 issue of meconium. We're going to talk about that, meconium  
7 again. I know you've heard it but these are the issues.

8 Now, should a pediatrician have been present? We  
9 believe so. It's going to be your determination whether or  
10 not you believe that Dr. Dumpe should have had a pediatrician  
11 there, and again, you heard argument that was, well, hey, even  
12 Dr. Jones says that if she showed up at 5:20, she would have  
13 said everything is fine.

14 Well, that's not the end of it, because Dr. Jones  
15 wasn't there. She doesn't know what the conditions were. And  
16 my point from Dr. Karotkin's testimony, which I developed a  
17 little bit more yesterday with Dr. Ringer, I believe it was.  
18 Yes, it was Dr. Ringer yesterday. If this baby had signs of a  
19 little bit of respiratory distress and a pediatrician came in,  
20 the policy that they keep saying is so great says that it's a  
21 pediatrician that has to evaluate the baby. That means you  
22 call a pediatrician up and you say, hey doc, can you come look  
23 at this baby.

24 At that point, the pediatrician can say who's there?  
25 You say Nurse Hendershot. The pediatrician can say I trust



1 her. Let her do it. It's fine, but that's the pediatrician's  
2 call. The policy is call the pediatrician, and no  
3 pediatrician was called here, so we're speculating as to what  
4 Dr. Jones would have done, but our point is is that there was  
5 a reason for a baby to be seen by a pediatrician, because how  
6 do you get 81 percent oxygen at 7:20 without it being worse or  
7 declining throughout birth or after birth. It had to be lower  
8 in the 90s at 6:00. It had to be abnormal at 5:45, 6:00.

9 And why do I say that? Because what you heard  
10 Dr. Coffin and Dr. Jones testify. That when you have meconium  
11 in the lungs, it acts as a bell valve. Air goes in. Doesn't  
12 all come out. What does that happen? Your body has buildup  
13 of carbon dioxide, so your oxygenation falls. It's  
14 progressive. It goes down. The only way that it got back up  
15 was remember 64 percent oxygen. They pumped a lot. So much  
16 more than Dr. Jones ever uses in her own nursery.

17 So she was -- she said this is a lot of oxygen for  
18 this kid. It's the only way to get the oxygen up, so this  
19 baby unfortunately, over those two hours, its oxygenation  
20 level had to be dropping, and a pediatrician would at least  
21 have been there to have seen it, and as Dr. Karotkin said,  
22 here's how easy it is, take some vitals and put a pulse ox on.  
23 Find out what it is. There is no record in that big binder,  
24 not one record that shows what Kendall's pulse ox was until  
25 7:25.

1           Now, Nurse Hendershot, what about the negligence for  
2 her? Well, again, complicated delivery, had a child with  
3 meconium. She noted moist lungs, and again, there was no  
4 checkup from 5:30 until 7:00 a.m. Is that a dispute? Yes. I  
5 will address it, but there isn't any record of  
6 Nurse Hendershot examining Kendall. It's her word and what  
7 she said, and I know that's a factual dispute that you have to  
8 determine. Family's word as compared to the nurse's word.

9           If you simply trust the doctors' words in this case,  
10 if you simply trust that every doctor that came here is  
11 telling the truth and my clients are lying, I lose, but I'm  
12 going to show you there were some -- I'm not going to say  
13 lies, but there were a lot of inconsistencies, a lot of things  
14 that the defendants themselves said. So again, these are  
15 things that you have to determine.

16           This is our point, pulse ox. Nurse Hendershot didn't  
17 take any pulse ox. We don't know what it is. Their excuse,  
18 it's better to bond with the baby for two hours. Now, I know  
19 somebody and what price they would pay for a pulse ox for not  
20 bonding. It's not a difficult and it's not an invasive  
21 procedure to take a pulse ox, and that's all that had to be  
22 done and it would be a different story.

23           Safety rule two, hospital must take all precautions.  
24 Again, I'm going to talk about this, but do you think that  
25 Nurse Hendershot was in there every 15 minutes? Do you think

1 that her notes are accurate? Do you think that her testimony  
2 is that she came in and examined Carissa and then examined the  
3 baby or at least heard the baby is accurate, or how about  
4 Tyler? Tyler came in here. I know he's not a medical  
5 professional. This is your job. Your job is to evaluate the  
6 credibility. The judge will instruct you on this. She has a  
7 whole litany, and she's already told you a little bit about  
8 it, but things that you do to judge credibility.

9 Whenever he came up here, he's a young kid. He's in  
10 his 20.s, he doesn't know anything about health care. He was  
11 scared and nervous, just as scared and nervous as any friend  
12 of a parent who just had a child, and he had the guts to get  
13 up and go outside and try to get a nurse to come in and help.

14 He might have made a mistake as to saying the baby is  
15 crying and not that there was more concern, but he tried, and  
16 here's what was really -- really got me here. This whole case  
17 has been about the care that the defendants have provided, and  
18 the judge will tell you, in this case, they have not made any  
19 claim. They have not brought any claim against Carissa or  
20 Matt, and what I mean by that is they had the right to say  
21 we're blaming you. It's your fault. You should have brought  
22 the kid out to the nursery. You should have done more, but  
23 you know what? They didn't do that until these closing  
24 arguments.

25 I just heard both counsel come and blame the parents

1 for not bringing this baby's condition to the nursery staff or  
2 to the nurses. I mean, really? These two young kids with  
3 their first baby trying to do all they can? They have all  
4 their family in there. They send a friend out to get a nurse  
5 who comes to the door and then they get blamed in this case.

6 Now, this is just a picture of a nurses' station, and  
7 I tell you it's a nurses' station because it's not the nurses'  
8 station at Heritage Valley Beaver because we never got a  
9 picture of that nurses' station. Remember the only pictures  
10 we got are inside the room, and we were told that it's right  
11 outside the door, and I asked is anybody else going to bring a  
12 picture, and we never found out, so I don't know exactly where  
13 it is, but I'm using this as an example to say this is what  
14 the nurses do.

15 They have to sit at computers and write their  
16 electronic medical records, and again, I know that you'll be  
17 in there deliberating and I know these binders are very heavy,  
18 and I apologize for giving them all to you, but that's we have  
19 to do. You'll see in the medical records the majority of them  
20 are electronic, so every nurse has to click on an electronic  
21 medical record to put an entry in. That's the way medical  
22 care is these days, so that's where they are. That's what  
23 they are doing, and that's where Nurse Hendershot was whenever  
24 they said they looked out the door, she was at the nurses'  
25 station. She came to the door and only poked her head in.

1           Now, Nurse McCrory, Nurse McCrory I think did a good  
2 job. The only issue that we have is what about this time?  
3 Dr. Heiple, I know defense characterization of Dr. Heiple is  
4 that he wasn't -- he might have been mistaken, but again, I'm  
5 not going to go over the timeline again, but why -- did he get  
6 there at 7:35? Did he get there at 8:00? What was going on?

7           Now, Dr. Heiple, he comes in at 8:00, has a normal  
8 assessment, doesn't even call the pediatrician. He was a  
9 young doctor. This was his third month, I believe, on the  
10 pediatric rounding, so I don't think he added anything to this  
11 case. I don't think he helped Kendall in any way, and the  
12 only thing that he did was delay the care. I think that  
13 slideshow summed it up. Nurse McCrory found an abnormal exam.  
14 He comes in and finds it normal. Dr. Jones comes in and finds  
15 an abnormal exam. I think he was unfortunately in over his  
16 head, and the problem is is that being in over your head is  
17 not an excuse, because this is medical care. This is doctors.

18           They have to deal with very tough situations, and  
19 just because it's your third month on, it doesn't mean that  
20 you can simply stand around and wait for help. Your task, you  
21 were called, take care of this child. We need help, and he  
22 just simply said...

23           The earlier you treat something, again, this is  
24 another issue too. Again, I'm relying on your recollection,  
25 but this is mine. Dr. Jones says 8:00. Orders now. 8:32,

1 Dr. Heiple enters the orders. 9:50 gentamicin comes. He  
2 didn't order it stat. Even Dr. Coffin was here yesterday and  
3 said prescription antibiotics sepsis workup, get it within an  
4 hour. I said what about an hour and 50. She said that's not  
5 acceptable.

6 And that's the thing is that this gentamicin was the  
7 only drug that was effective against E. coli, and she didn't  
8 get it until an hour and 50 minutes before her death, so yes,  
9 it was ineffective. Would it have been effective at 6:20?  
10 6:40?

11 Now, Dr. Jones, again, was she called or not? This  
12 is your job to determine the credibility, to determine if  
13 these notes are accurate or not. The other thing to remember  
14 is about treating earlier. Dr. Jones testified she came into  
15 a crisis. Even Dr. Coffin said you don't want to walk into a  
16 crisis. You want to treat it better. You don't want to end  
17 up in the emergency room. You want to go to your PCP before  
18 you end up in the emergency room. Unfortunately, there was no  
19 PCP for Kendall. It was simply straight in the emergency  
20 room.

21 Now, the second question is this issue of causation.  
22 This is tough. It's not an easy question to answer, because  
23 you are the jury who has to determine whether or not, if  
24 earlier treatment had been given to Kendall, was there a  
25 chance that she would have survived?

1           What helps you determine that is some of the expert  
2 testimony, and I believe that most, if not all, of the experts  
3 said if there was treatment earlier, before 7:20, at 6:20,  
4 6:50, there was a chance that the antibiotics could have saved  
5 Kendall. Again, you have to remember your recollection of  
6 what Dr. Ringer, what Dr. Coffin said, what Dr. Boyd, all of  
7 these doctors said, but I believe, and even my experts, they  
8 all agreed earlier treatment of antibiotics for E. coli would  
9 have given Kendall a chance.

10           Do we know in absolute certainty what her chances  
11 would have been? No. Nobody can do that. The reason is,  
12 nobody can go back in time and say, hey, let's do an  
13 experiment on babies and give a baby with E. coli at four  
14 hours and let's let the next baby get it at eight hours and  
15 see what the difference is. You don't do that. Once you  
16 found an infection, you give antibiotics immediately.

17           I'm getting a little confusing. You can't go back in  
18 time and say with 100 percent certainty the antibiotics would  
19 have worked. The point is, they all said it could have. A  
20 chance to survive could have been there, and that is what the  
21 judge is going to read you on the law. That's what the law is  
22 on causation, and that's why I said it's a difficult,  
23 difficult issue, but this summarizes it a little bit.

24           I've been accused of running away from E. coli, that  
25 E. coli didn't cause her death. I told you, I thought, and

1 through my questioning, I hoped that I explained that I did,  
2 yes, and I know that bronchopneumonia was there too, but it is  
3 our theory in the case that the problem was that there was an  
4 untreated massive aspiration of meconium.

5 I know they don't want me to say massive, but that's  
6 what it was. That's the official report, a massive aspiration  
7 of meconium, and this is the whole issue about air being  
8 trapped, unable to be exchanged, unable to fight off an  
9 infection. Those are all of the issues that you are going to  
10 have to determine.

11 Was there a lifeline? Could she have been saved? If  
12 somebody had given her antibiotics earlier, like you followed  
13 what Dr. Karotkin said, hey, somebody was there every 15  
14 minutes to check vitals and to do a pulse ox and if something  
15 was noticed, then let's get a pediatrician in there.

16 Do you believe what the family said, that there was  
17 crying, that it was painful, that Kylee noticed what she  
18 thought was grunting? She wanted Matt to get a nurse. If you  
19 believe that was happening, do you believe those would be any  
20 early signs of respiratory distress that a pediatrician who  
21 would be in the room might pick up on? If so, a chance, a  
22 life preserver wasn't thrown to Kendall, and by the time  
23 LifeFlight was called, it was too late. I know that they did  
24 everything they could, but by the time they got there, it was  
25 too late.



1           Now, percentages of responsibility, this is the third  
2 question, if you find any of these defendants liable, and let  
3 me explain. You can find Dr. Dumpe for the United States  
4 liable, that's one; number two would be Heritage Valley  
5 Beaver, and Heritage Valley Beaver is actually any of the  
6 three. It doesn't have to be all three. So for example, you  
7 can say Nurse McCrory, she did what she was supposed to do.  
8 Dr. Heiple didn't or Nurse Hendershot should have been there  
9 and she wasn't. If you find any one of them fell below the  
10 standard of care, then Heritage Valley would be liable, would  
11 be negligent, so you don't have to find all three of them  
12 negligent to find Heritage Valley negligent.

13           There's also an overriding issue about Heritage  
14 Valley, which I'll talk about in a minute about the policies.  
15 I know we have had enough about policies, but I do have to  
16 talk about it, and the last issue is Dr. Jones.

17           Now, here are the issues and I brought this picture  
18 up, because I wanted to explain to you that, unfortunately, I  
19 have to get down in the weeds, and what I mean by the weeds is  
20 you heard a lot of little issues come up in this case, a lot  
21 of little facts, a lot of things in the general scheme might  
22 not be a big deal, but they matter for you, and I want to  
23 point out these issues to help you determine whether or not  
24 you think they would help with some of the decisions on the  
25 issues you have.

1 Policies, we've gone over them. The policies were so  
2 confusing, Dr. Dumpe had to be called twice to talk about  
3 them. Here is the issue. If you remember Dr. Karotkin said  
4 when there's meconium, pediatrician is called in on the  
5 delivery.

6 I believe if you remember Dr. Wiesenfeld's testimony,  
7 he said the same thing, meconium, pediatrician. Now, Heritage  
8 Valley Beaver kept arguing that their policies are up and  
9 above, way above the standard, but it didn't make sense to me,  
10 and again, this is your recollection, but it seems to me that  
11 if you are at Magee or wherever, Dr. Karotkin in Virginia  
12 practices, St. Mary, if you have any of these meconiums, the  
13 pediatrician is there, but if you are at Heritage Beaver, only  
14 if you have it on the far left do you get a pediatrician.

15 Now, I think that unfortunately this has been one of  
16 the -- I don't want to say silliest, but worthless arguments  
17 that we have had. Why do you or I have to sit here and debate  
18 the quality of meconium? Nurse Hendershot said it was the  
19 second bottle from the right. Dr. Dumpe said it was the third  
20 bottle from the right. Nurse McCrory said it looked like it  
21 was something to the fourth bottle.

22 Now, we didn't take any samples of the meconium, so  
23 we are here, you are here, we're all here to judge a policy  
24 about whether a pediatrician should be called because there's  
25 particulate matter in meconium, but wouldn't the better policy

1 simply be, like Dr. Karotkin and Dr. Wiesenfeld said? You see  
2 meconium, call a pediatrician. We don't have to have this  
3 debate. We wouldn't be having this case. We wouldn't be  
4 talking about particulate matter. That is a policy that can  
5 be changed. That's what your verdict can do.

6 Your verdict can say, hey, if we had a policy that  
7 said meconium, a pediatrician would have been there. Kendall  
8 would have been looked at. Why are we debating this? How can  
9 you decide that?

10 And they say, oh, I have no evidence whatsoever that  
11 it was meconium particulate matter, and I do. Number one,  
12 Jamie said that, whenever she sucked it out of Kendall's  
13 throat at 7:20, she said it was all the junk, and she pointed  
14 to that bottle and said it was closer to that, and the second  
15 is Dr. Min. He said massive aspiration of meconium and that  
16 there was debris in the meconium.

17 Here's another one, let's bond. It's good to cry. I  
18 don't know. Is it? The nurse can come in and she can see the  
19 baby. Remember the specific question though that Ms. Koczan  
20 asked. She said if you looked in the door, could you see the  
21 baby on the warmer? And Nurse Hendershot said yes.

22 Well, after Kendall was taken off the warmer, was she  
23 ever put back in the warmer? No. She was passed around the  
24 room. There were a whole bunch of friends. Ten people in the  
25 room, and here is what I think really happened. We'll get

1 down to it. 5:30 to 7:00, a lot of family and friends are  
2 coming in. Nurse Hendershot, she is a very nice,  
3 well-qualified nurse. She had made friends with Carissa and  
4 Matt all night. She was joking around with them. They have a  
5 delivery. It's a 120 pound woman gives birth to an eight  
6 pound seven ounce baby, big baby and a whole bunch of family  
7 and friends. She evaluates. She thinks the baby is fine.

8 Whole bunch of family and friends come in. They're  
9 enjoying it. I think, I could be wrong, I think she just  
10 said, hey, they are enjoying the baby. Let's just bond.  
11 There's no need for me to come in. I'll be right outside if  
12 they need anything.

13 And I, my personal opinion, I don't think she came  
14 in, and I base that on the testimony of the family and the  
15 friends. Nobody saw her come in, and we'll talk about her  
16 notes because this is what it is. In your binder at tab 2  
17 from pages 166 through 169, you can see that, and I mean,  
18 you'll be able to look at this when you are deliberating, but  
19 on those pages, you will see that at 6:00, at the 6:00  
20 assessment, Nurse Hendershot clicked on everything that she  
21 did for Carissa. She made 48 clicks under one minute. They  
22 are all timed at 7:32 a.m. She clicked on Carissa's condition  
23 48 different selections and that's what she testified to, that  
24 they are drop-down boxes or whatever, and think about that.

25 It's almost one a second, and she is going through an

1 electronic medical record and finding things. If you'll  
2 continue on after those pages, you'll see her 6:15, 6:30, 6:45  
3 and 7:00 assessments, and you'll see the time, and you'll see  
4 what happens, and at the end, it will say at the time it was  
5 entered, and you'll see that at 6:15, she had ten entries all  
6 done at the same time.

7 Now, is this medical record -- am I accusing her of  
8 creating a fraudulent medical record? What I am saying is  
9 that she might have been sitting at her desk at the end of her  
10 shift, because her shift was over at 7:30, she just finished a  
11 12 hour shift, and had to complete a record. Is this  
12 inaccurate? You tell me.

13 Has anybody else in this case said that the medical  
14 record in this case is inaccurate? And the answer is yes.  
15 Who said that? Dr. Jones said that. Dr. Jones said this  
16 medical record is inaccurate. She said there's no way those  
17 medical records that says I was notified is accurate. So how  
18 can we trust that Nurse Hendershot was actually in at 6:00?  
19 Again, you, as the jury, are going to have to take a look at  
20 that evidence and determine whether or not it's an accurate  
21 medical record or not.

22 Again, going in the weeds. Nurse Hendershot, I know,  
23 I know I took Kendall. Barb Hackney says, well, not if we  
24 catch them. Sometimes they bring them down. We always catch  
25 the dads bringing the babies down. Matt, first time dad,

1 again, light bulb memory or flash bulb memory, I remember  
2 dropping her off, kissing her on the head. Would he have a  
3 reason to lie about that? It was the last time he got to kiss  
4 his daughter. What does his recollection say? You have to  
5 evaluate that.

6 Vitals, again, 7:00 it's great. Well, we went over  
7 the pulse ox. In the nursery, this is sort of what I'm  
8 getting at is there seemed to be, to me, almost a script  
9 playing out in this case from the hospital's side.

10 Nurse McCrory gets on the stand and she says I  
11 remember that, whenever I saw the first sign of distress in  
12 Kendall, it was because she was dusky. And then they called  
13 Nurse Hackney who I deposed, and Nurse Hackney on the stand is  
14 asked the question, said is the first thing you saw was that  
15 she was dusky or is that the first thing that Nurse McCrory  
16 said. She says I think so. Question was asked by Ms. Koczan.

17 And then, if you remember, I had to pull out her  
18 deposition and say, hey, you told me twice that Nurse McCrory  
19 said she is breathing hard. That's a new finding. So why  
20 would Nurse Hackney come on this stand and not tell what she  
21 said in her deposition when she knew that was in her  
22 deposition if there wasn't a script about what she was to say?

23 Now, Nurse Kincade, do you remember her? She is  
24 still on vacation. She got a vacation out of this. She  
25 wasn't called until last Thursday. She came up from Arizona.

1 She gets put up at the Hampton Inn in Beaver until tomorrow,  
2 so she is going to be in town, and she came in here on Tuesday  
3 to say I remember exactly why I wrote that note and I remember  
4 that I was wrong. I assumed facts.

5 I said okay. You were in there for the rest of it.  
6 What do you remember about the rest of it? I only have a  
7 vague recollection about this baby that was in crisis. I'm  
8 writing down that x-rays are being taken, the transport. I  
9 just have a vague recollection of that, but other than this  
10 specific thing about the doctor being called, I remember that  
11 I assumed things.

12 I talked already about the hour and 50 minute delay.

13 Let's talk about Dr. Min. Here is the most  
14 interesting thing about Dr. Min. Dr. Min -- and think about  
15 this in this case. This is sort of amazing. Dr. Min is the  
16 hospital's pathologist. Dr. Min had no skin in this game, and  
17 he writes a report that says massive aspiration of meconium.  
18 The hospital walks away from massive aspiration of meconium to  
19 the extent that they go all the way up to Harvard and they  
20 hire an expert, Dr. Boyd, to come down here to tell you that  
21 Dr. Min, their own pathologist, was wrong.

22 I mean, Dr. Min was my expert. They said why didn't  
23 you -- why didn't Mr. Price bring an expert? Because I had  
24 Dr. Min. Dr. Min wrote his report and this is what -- we've  
25 seen this, and Mr. Colville said he walked away. He no longer

1 believes it's massive aspiration of meconium.

2 Well, remember this. Dr. Dumpe came down to see him.  
3 Why? Because he had to get rid of massive aspiration of  
4 meconium. But it's still there and their other excuse now is,  
5 oh, it's in the clinical record. You know what the clinical  
6 record is. It's those binders. You know what you can do?  
7 You can go through those binders and look for the word  
8 massive. The only place you are going to find it is in the  
9 autopsy report.

10 They keep saying it must have been a clinical  
11 finding. Here's what I'll tell you too. If the word massive  
12 was a "clinical finding," don't you think that they would have  
13 hit me right across the chin with it in some medical record?  
14 You have seen every medical record ad nauseam brought up by  
15 the defense. They didn't once bring up a medical record that  
16 said massive. The only record that says massive aspiration of  
17 meconium is the autopsy.

18 Now, that's enough with the weeds. The last question  
19 that you are going to be answering -- I'm sorry -- asked to  
20 answer is about damages and this is about Kendall and about  
21 Kendall's estate. So under the law, you are permitted to  
22 award damages to Kendall's estate under two different claims,  
23 and you'll see it on the verdict slip. One is called a  
24 survival action and one is called wrongful death.

25 I don't have to get into too much of the particulars,



1 but survival basically means the claims that, if Kendall had  
2 survived, would have stayed with her and that's the wage loss.  
3 So if Kendall had survived, if this baby had survived, what  
4 would she have been able to do in her lifetime, and what we  
5 have to do is bring in an expert, and that's Dr. Kenkel, and  
6 he simply gave you the most conservative he could.

7 He said if you go to high school these days and you  
8 work in your life, you are going to make in your lifetime  
9 almost \$800,000. If you go to college, almost 1.7 million.  
10 You can determine she may not have done anything or she might  
11 have excelled. The judge will give you an instruction on  
12 that, but you are to determine whether or not, if there is any  
13 wage loss, what it is.

14 The other part of the claim is called wrongful death,  
15 and that is the contributions, the noneconomic loss, and that  
16 is for Carissa and Matt, and this is the part of the case  
17 where I can't tell you or give you any guidance as to how you  
18 are to judge this or what you are to do about determining if  
19 there are any damages in this. It's simply what you think a  
20 loss to these people of a child matters and how much, and  
21 you've seen these pictures, but this is what it comes down to  
22 is does this life in this community with this health care  
23 matter, and you are the ones to make that determination.

24 Now, finally, I just want to finish and say I too  
25 want to thank you for being here.

1 I always put these slides up at the end because you  
2 know, we are here in this courtroom and we have been here for  
3 a long time, and there's no windows and we might not know  
4 what's going on, but you all are carrying on a great tradition  
5 that comes way back from England and continues into America,  
6 and I know that we've all seen this movie, and this is going  
7 to be you, you are all going to be jurors, but it's very, very  
8 important that we handle these cases in this manner.

9 And why do I say "this manner," because this is what  
10 I believe in. This is what Ms. Koczan, Mr. Colville and the  
11 judge all believe in. It's a civil disagreement.

12 Nobody is here -- we don't settle this out in the  
13 street. We settle it before you. We have empaneled you as a  
14 jury to say, hey, look, it's a tough decision. It's not easy,  
15 but this is a civil dispute, and this is what matters to our  
16 democracy and this is how we handle things.

17 So I thank you. I thank you from the bottom of my  
18 heart. I know the court and counsel do too. It's going to be  
19 tough, but this is the question. Is this acceptable medical  
20 care, because you are -- you really are the conscience of the  
21 community, and you are going to have to go through the verdict  
22 slip and you are going to have to render a decision.

23 And again, I would ask you on behalf of the  
24 plaintiffs, on behalf of Matt and Carissa and Kendall, to find  
25 for us, but again, you are free to choose your verdict. Thank

1       you.

2               THE COURT: Thank you, Mr. Price, for those remarks.  
3       Ladies and gentlemen of the jury, at this point, we're going  
4       to take our morning break, and as we have done in the past, I  
5       would ask that you leave your exhibit binders and notebooks  
6       there, and once again, we're almost there, but you still have  
7       to hear my final instructions, so to that point, you should  
8       still not talk about the case amongst yourselves, and  
9       obviously, you are not going to communicate or research about  
10      the case.

11             Mr. Galovich is also going to be in with you, because  
12      this is the one time that the federal government will buy you  
13      a lunch, so to that end, he's going to be talking to you about  
14      lunch and your lunch order. Let's all get back together here  
15      on the record at 11:15 and I'll give you my final instructions  
16      at that time. Let's all rise for our jury.

17             (Jury excused.)

18             THE COURT: We'll start again at 11:15 with the  
19      instructions.

20             MS. KOCZAN: I just have an issue with one of the  
21      things that Mr. Price said. He didn't use the word send a  
22      message but essentially that was the import. Your verdict  
23      will, you know, basically tell the hospital, send them a  
24      message that this isn't acceptable. That's not appropriate  
25      argument, and I would note that on the record and object to

1 that.

2 THE COURT: Okay. Any response, Mr. Price, for the  
3 record?

4 MR. PRICE: I believe that my closing was entirely  
5 within the bounds of permissible argument.

6 THE COURT: Mr. Colville, is there anything you want  
7 to add to that statement?

8 MR. COLVILLE: No, Your Honor.

9 THE COURT: So you've made the objection. Anything  
10 further? Are you asking for a limiting instruction? What are  
11 you asking for?

12 MS. KOCZAN: I am, Your Honor. That's not  
13 appropriate argument.

14 THE COURT: Do you have language for a limiting  
15 instruction?

16 MS. KOCZAN: I do not. It just happened.

17 THE COURT: Well, you have 15 minutes to come up with  
18 something.

19 MS. KOCZAN: I will do that.

20 MR. PRICE: Are we free to go?

21 THE COURT: Yes.

22 (Recess taken.)

23 THE COURT: Ms. Koczan, do you have a proposed  
24 limiting instruction for the court?

25 MS. KOCZAN: I do, Your Honor. I hope you can read

1 my handwriting.

2 THE COURT: Have you shared it with Mr. Price?

3 MS. KOCZAN: No, I haven't.

4 THE COURT: Why don't you state it out loud so  
5 everybody has the benefit of it?

6 MS. KOCZAN: You have heard argument by Mr. Price  
7 that by rendering a verdict against Heritage Valley Beaver  
8 that you would, in essence, be sending a message to the  
9 hospital that its policy was not appropriate and should be  
10 changed. This is not appropriate argument and you should  
11 disregard it.

12 THE COURT: Mr. Price, any comment?

13 MR. PRICE: Sure. I don't believe that I said send a  
14 message. What I said was that in your verdict, you would be  
15 saying that the policy was wrong. I don't think that's the  
16 same as punishment, sending a message. I think that's what  
17 their verdict is going to say, whether they think it's right  
18 or wrong.

19 THE COURT: Anything further on this point?

20 MS. KOCZAN: No, Your Honor. The limiting  
21 instruction does not say that he said -- I'm not accusing him  
22 of saying that he sent a message, but in essence, that was  
23 what the statement was.

24 THE COURT: That's the argument that you made. Over  
25 the break, we have had an opportunity to research this

1 interesting issue, and to that end, I call your attention to  
2 Larsen, "Navigating the Federal Trial."

3 "Generally this type of argument is not necessarily  
4 objectionable unless it is designed to inflame the passions or  
5 appeals or the prejudices of the jury. Problems usually arise  
6 when the argument asks the jury to abandon its traditional  
7 role as the fact-finder in the case and instead use its  
8 verdict to correct some larger societal problem.

9 "In other words, although the jurors are supposed to  
10 focus on deciding the essential elements of the charge, claim  
11 or defense in the pending case, the objectionable conscience  
12 of the community argument diverts their attention instead to a  
13 different, broader and irrelevant issue."

14 And here the examples are: Supporting the war on  
15 drugs, helping to reduce gun violence in the community,  
16 deterring others from committing criminal acts and the like  
17 when reaching their verdict.

18 Now, when you read this section of Larsen, there are  
19 a great number of head notes, none of which are Third Circuit.

20 Also, taking a look at Park on "Trial Objections," in  
21 their handbook, "Calls for punishment or deterrence in civil  
22 cases are appropriate when punitive damages are an issue but  
23 not otherwise. Although civil damages are normally  
24 compensatory not punitive, counsel may nevertheless ask the  
25 jury which serves as the conscience of the community to send a

1 message to wrong doers and to deter others where punitive  
2 damages are an issue," and then it goes on to cite what one  
3 litigant asked the jury for, which is not pertinent in this  
4 particular case. And again, a number of case citations, none  
5 of which are Third Circuit.

6 Interestingly, in a recent decision, Judge Mariani  
7 who I quoted yesterday, in the middle district in a case  
8 called Botey versus Green, 2017 Westlaw 2536397, basically  
9 says that -- and this, by the way, is in regard to a motion in  
10 limine, and their judge there was concerned because he, in his  
11 words, discerned in plaintiff's brief some intent to use  
12 language such as send a message or to suggest that the jury  
13 act as the conscience of the community on the basis that  
14 plaintiff views punitive damages as fulfilling a larger  
15 societal role.

16 Judge Mariani went on to rule that he would not allow  
17 the plaintiff to make any prejudicial appeals to the members  
18 of the jury. In that case, based on the Texas location of the  
19 defendants and the Tennessee residence of the defendant, in  
20 his words, those statements would be immaterial, parochial and  
21 irrelevant, so he made those admonitions and he cautioned  
22 counsel not to appeal to regional prejudices, corporate  
23 antipathy or other biases. That's as far as he went.

24 I also take note of a Superior Court decision, and  
25 that case is Darlene Nelson versus Airco Welder Supply, et al.

1 It's at 107 A.3d 146 2014. It was distinguished and given  
2 some negative treatment in another case, another asbestos case  
3 as it turns out.

4 Once again, these closing arguments were also  
5 designed to elicit punitive damages akin to what Judge Mariani  
6 was dealing with, and there, there's a quote that the  
7 attorney, in making closing, inserted a punitive element into  
8 his discussion of damages by stating, "At the end of the day,  
9 ladies and gentlemen, you represent the conscience of the  
10 community, and I'm asking you to award an amount of money that  
11 is so significant and substantial that it will do justice that  
12 everyone will know the justice is done, not just the Nelson  
13 family but everybody that's in this community. Do not let  
14 this man die in vain."

15 The judge in that case -- the Superior Court in that  
16 case found the language to be inflammatory because it  
17 allegedly attributed improper motives to the appellants, and  
18 to that end, the case was going to be sent down for retrial,  
19 and hence, the Superior Court admonished counsel from  
20 needlessly inflaming the passions of the jury.

21 So my sense, in reading all of this -- and this is a  
22 case where it's all agreed that the damages being sought do  
23 not include punitive damages, number one. Number two, the way  
24 it was phrased, the jury is being asked whether this was or  
25 wasn't acceptable medical care. As he was talking about the,



1 "conscience of the community," he had a picture of jurors  
2 there, and to that end, I don't think that that particular  
3 argument goes as far as some of these other arguments which,  
4 in effect, ask to have a message sent, but I do believe, even  
5 though I've already instructed the jury on closing arguments,  
6 that I should reiterate that instruction.

7 As everybody knows, the demonstratives do not go back  
8 with the jury, and they are not going to do that in this  
9 particular instance, so your objection is preserved. The  
10 argument is noted. We'll reinstruct the jury just as a  
11 reminder about closing arguments. Otherwise, I think we're  
12 going to be calling too much attention to that particular  
13 argument.

14 Mr. Galovich, is everybody back and assembled?

15 THE CLERK: Yes, Your Honor.

16 (Jury present.)

17 THE COURT: Thank you, Mr. Galovich. Again, thank  
18 you ladies and gentlemen of the jury. I know Mr. Galovich has  
19 secured your lunch orders, and you are refreshed and renewed,  
20 and so now the court is about to provide you my final  
21 instructions on this matter.

22 Let me remind you, vis-à-vis the closing arguments,  
23 they are designed to present to you the parties' theories  
24 about what the evidence has shown and what conclusions may be  
25 drawn from the evidence. What you've heard in closing

1 arguments is not evidence. You instead have seen and heard  
2 all of the evidence. It will be up to you to ultimately find  
3 the facts and then apply this law that I'm going to give you  
4 as I will now instruct you.

5 As I've indicated, you have now heard all of the  
6 evidence for this case as well as the parties' closing  
7 arguments. It's now my duty to instruct you on the relevant  
8 law. In a few moments, you'll be given the verdict form for  
9 this case on which you will answer specific questions.

10 Mr. Galovich, do you have extra copies made of the  
11 verdict slip?

12 THE CLERK: I do not. Would you like me to print  
13 them?

14 THE COURT: That would be terrific. Let's hold up  
15 and let's do it here. I apologize. We should have given you  
16 that cue earlier. What I'm about to do, ladies and gentlemen,  
17 is give each one of you one of these verdict slips so you can  
18 follow along.

19 Let the record reflect that Mr. Galovich, my deputy,  
20 is going to provide each of the jurors with a copy of the  
21 verdict slip, and I ask each of you to please take a few  
22 minutes to read through this verdict form, because the  
23 instructions I'm about to give you will help you answer the  
24 questions on the verdict form. So just take a couple minutes  
25 so you read through that verdict form and you'll have that in

1 the back of your mind before I give you the rest of my  
2 instructions.

3 (Brief pause.)

4 THE COURT: It appears that everyone has had a chance  
5 to read through the verdict slip so I'm going to continue.

6 When you retire to the jury room to deliberate, you  
7 may take with you my instructions and you'll be getting a copy  
8 of these instructions once we make sure they are exactly what  
9 needs to be said, your notes, of course your notepads and the  
10 exhibits that the court has admitted into evidence and which  
11 the court permits in the jury room, and as you know, you are  
12 going to take those binders back with you, and then in  
13 addition, any loose exhibits that have been admitted will also  
14 be given to you.

15 Once you are there, you should select one member of  
16 the jury as your foreperson. That person will preside over  
17 the deliberations and speak for you here in open court. Now,  
18 you have two main duties as jurors.

19 The first one is, as I told you before, to decide  
20 what the facts are from the evidence that you saw and heard  
21 here in court. Deciding what the facts are is your job, not  
22 mine, and nothing that I have said or done during the trial is  
23 meant to influence your decision about the facts in any way.  
24 You should understand that I am absolutely neutral and nothing  
25 in the manner in which I deliver these instructions to you is,

1 in any sense, an expression of my opinion about this case.

2 Your second duty is to take the law that I give you,  
3 apply it to the facts and decide if, by a preponderance of the  
4 evidence, plaintiffs have established their claims. It is my  
5 job to instruct you about the law, and you are bound by the  
6 oath that you took at the beginning of this trial to follow  
7 the instructions that I give you, even if you personally  
8 disagree with them. This includes the instructions that I  
9 gave you before and during the trial and these final  
10 instructions. All of the instructions are important and you  
11 should consider them together as a whole. Do not disregard or  
12 give special attention to any one instruction and do not  
13 question the wisdom of any rule of law or rule of evidence I  
14 state.

15 In other words, do not substitute your own notion or  
16 opinion as to what the law is or ought to be. Perform these  
17 duties fairly. Do not let any bias, sympathy or prejudice  
18 that you may feel toward one side or the other influence your  
19 decision in any way.

20 Our system of law does not permit jurors to be  
21 governed by sympathy, prejudice or public opinion. The  
22 parties are entitled to the same fair trial at your hands.  
23 All persons stand equal before the law and are to be dealt  
24 with as equals in a court of justice.

25 In this case, one of the defendants is a corporation.

1 The mere fact that one of the parties is a corporation does  
2 not mean it is entitled to any less consideration by you.

3 Furthermore, the fact that a governmental entity is  
4 involved as a party must not affect your decision in any way.  
5 As a reminder, the United States' involvement in this matter  
6 is related to Dr. Kevin Dumpe, so when you hear Dr. Dumpe,  
7 think United States of America.

8 Both the parties and the public expect that you will  
9 carefully and impartially consider all of the evidence in this  
10 case, follow the law as stated by the court and reach a just  
11 verdict regardless of the consequences. To this end, I must  
12 remind you that Carissa Peronis and Matthew Fritzius, the  
13 plaintiffs, have the burden of proving their case by a  
14 preponderance of the evidence.

15 As you may recall, that means plaintiffs have to  
16 prove, in light of all the evidence, that what they claim is  
17 more likely so than not so.

18 To say it differently, if you were to put the  
19 evidence favorable to the plaintiffs and the evidence  
20 favorable to the defendants on opposite sides of a scale,  
21 plaintiffs would have to make the scales tip somewhat on their  
22 side. If plaintiffs fail to meet this burden, the verdict  
23 must be for the defendants.

24 Plaintiffs have the burden to prove, number one, that  
25 Dr. Dumpe, Dr. Jones, the employees of the hospital defendants

1 and/or the hospital defendants themselves were negligent.

2 Number two, that the negligent conduct of Dr. Dumpe,  
3 Dr. Jones, the employees of the hospital defendants and/or the  
4 hospital defendants themselves was a factual cause in bringing  
5 about harm to Kendall Peronis.

6 And number three, to the extent you find negligence  
7 on the part of any of the defendants, the damages caused by  
8 such negligence.

9 At this time, let me remind you of the parties'  
10 stipulations of fact. As noted in the court's preliminary  
11 instructions and during the trial, the parties in this case  
12 agreed or stipulated to these facts and you must accept these  
13 facts as true while deliberating the substantive issues in  
14 this case even though nothing more may have been said about  
15 them during the trial.

16 The following are the stipulations by the parties to  
17 this case: That the medical records of Carissa Peronis and  
18 Kendall Peronis are authentic; that at all times relevant to  
19 this case, all the nurses and resident doctors or interns were  
20 employees of Valley Medical Facilities Incorporated, trading  
21 and doing business as Heritage Valley Beaver; that at all  
22 times relevant to this case, Dr. Hilary Jones was an employee  
23 of Heritage Valley Pediatrics; that there is no claim against  
24 Dr. Hilary Jones for her care of Kendall Peronis once she  
25 began to administer that care; that there is no claim that the

1 infection Carissa Peronis had while carrying Kendall Peronis  
2 had any relation to the E. coli sepsis infection Kendall  
3 Peronis developed. In fact, Dr. Harold Wiesenfeld testified  
4 that the bacterial infection was not related in any way to the  
5 infection at issue.

6 As I explained in the preliminary instructions, there  
7 are two types of evidence that you may use in reaching your  
8 verdict: Direct evidence, which includes something that the  
9 witness knows through his own senses or an exhibit where the  
10 fact to be proved is its existence or current condition, and  
11 circumstantial evidence which is proof of one or more facts  
12 from which you can find another fact.

13 You should consider both kinds of evidence that are  
14 presented to you. The law makes no distinction in the weight  
15 to be given to either direct or circumstantial evidence. You  
16 are to decide how much weight to give any evidence. I will  
17 now give you an example of the difference between direct and  
18 circumstantial evidence.

19 If you would go to bed at night, and as you pull down  
20 the shades, you see that it is snowing. That is direct  
21 evidence that it has snowed.

22 On the other hand, if you go to bed at night when  
23 nothing is on the ground and you wake up the next morning to  
24 see snow on the ground, that is circumstantial evidence that  
25 it snowed during the night.

1           Also remember that, unless I instructed you otherwise  
2 during the course of this trial, when determining whether any  
3 fact has been proved by a preponderance of the evidence, you  
4 may consider as evidence, number one, the testimony of the  
5 witnesses; number two, documents and other things received as  
6 exhibits; number three, any admissions or any facts that are  
7 stipulated, that is, formally agreed to by the parties; and  
8 number four, any facts that are judicially noticed, that is,  
9 facts I say you must accept as true even without other  
10 evidence.

11           The following things are not evidence:

12           Number one, statements, arguments and questions of  
13 the lawyers for the parties in this case.

14           Number two, charts, summaries, timelines or lists  
15 used by the lawyers for the parties in this case when  
16 examining a witness or making arguments to you. These  
17 demonstrative exhibits have not been received in evidence and  
18 they were shown to you only to explain or illustrate the  
19 contents of documents, testimony or other evidence in the  
20 case. As such, they are not proof of any facts. They are not  
21 binding on you in any way.

22           If they do not correctly reflect the facts shown by  
23 the evidence in this case, you should disregard any or all of  
24 them and determine the facts from the evidence.

25           Number three, objections by lawyers.



1           Number four, any testimony I tell you to disregard.

2           And, number five, anything you may see or hear about  
3 this case outside of the courtroom.

4           You must make your decision based only on the  
5 evidence that you've seen and heard in the court. Do not let  
6 rumors, suspicions or anything else that you may see or hear  
7 outside of the court influence your decision in any way. You  
8 should use your common sense in weighing the evidence.  
9 Consider it in light of your everyday experience with people  
10 and events and give it whatever weight you believe it  
11 deserves.

12           If your experience tells you that certain evidence  
13 reasonably leads to a conclusion, you are free to reach that  
14 conclusion.

15           As you know, there are rules that control what can be  
16 received into evidence by the court. You should not be  
17 influenced by the fact that objections were made during trial.  
18 As I just instructed you, objections to questions are not  
19 evidence. Lawyers have an obligation to their clients to make  
20 objections when they believe that evidence being offered is  
21 improper under the rules of evidence.

22           Likewise, you should not be influenced by the court's  
23 rulings on objections. If an objection was sustained, ignore  
24 the question that was asked. If an objection was overruled,  
25 treat the answer like any other.

1           If you are instructed that some item of evidence was  
2       received for a limited purpose only, you must follow that  
3       instruction.

4           Also, if certain testimony or other evidence is  
5       ordered struck from the record, it must be disregarded. Do  
6       not consider any testimony or other evidence that was struck  
7       or excluded. Do not speculate about what a witness might have  
8       said or what an exhibit might have shown.

9           You may certainly consider all the exhibits which  
10      have been admitted into evidence. As you may have observed,  
11      there are some exhibits which contain redactions. Redactions  
12      are those areas which have been blotted from your view. These  
13      redactions cover protected personal information and/or matters  
14      which are not relevant to your deliberations. Information was  
15      redacted because the court determined that it should not play  
16      a role in your decision making regarding the case before you.

17          Again, do not speculate about the redacted  
18      information. You are simply to assume that what was redacted  
19      was not relevant to your deliberations. In deciding what the  
20      facts are, you will have to review all the evidence. You will  
21      have to decide what testimony you believe and what testimony  
22      you did not believe. In making this determination, you may  
23      also consider the exhibits admitted into evidence.

24          During the trial, you have heard testimony from both  
25      fact witnesses and expert witnesses. In general, the opinion

1 of an expert has value only when you accept the facts upon  
2 which it is based. This is true whether the facts are assumed  
3 hypothetically by the expert or they come from the expert's  
4 personal knowledge, from some other proper source or from some  
5 combination of these.

6 With regard to fact witnesses, you should carefully  
7 scrutinize the testimony you heard from all the witnesses, the  
8 circumstances under which each witness has testified and every  
9 matter in evidence which tends to show whether a witness is  
10 worthy of belief.

11 In deciding what the facts are, you will have to  
12 decide what testimony you believed and what testimony you did  
13 not believe. The number of witnesses offered by one side or  
14 the other does not, by itself, determine the weight of the  
15 evidence. It is a factor, but only one of many factors that  
16 you should consider.

17 Whether the witnesses appear to be biased or unbiased  
18 and whether they are interested or disinterested persons are  
19 among the important factors that indicate the reliability of  
20 their testimony. The important thing is the quality of the  
21 testimony of each witness.

22 In short, the test is not which side brings the  
23 greater number of witnesses or presents the greater quantity  
24 of evidence, but which witness or witnesses and which evidence  
25 you consider most believable. Even the testimony of one

1 witness may outweigh that of many if you have reason to  
2 believe his or her testimony over the others.

3 On the other hand, where the testimony of the  
4 witnesses appears to you to be of the same quality, the weight  
5 of numbers could assume particular significance, but again,  
6 that is something you must decide. As you consider the  
7 evidence, you may find inconsistencies. Yet even actual  
8 contradictions in the testimony of witnesses do not  
9 necessarily mean that any witness has been willfully false in  
10 giving his or her testimony.

11 Poor memory is not uncommon. Sometimes a witness  
12 forgets or sometimes he or she remembers incorrectly. It is  
13 also true that two persons witnessing an event may see, hear  
14 or remember it differently. If the testimony of a witness  
15 seems inconsistent within itself or if the testimony given by  
16 several witnesses conflicts, you should try to reconcile the  
17 differences. If you cannot reconcile the differences, you  
18 must then decide which testimony, if any, you believe.

19 If different parts of the testimony of any witness or  
20 witnesses appear to be inconsistent, you should try to  
21 reconcile the conflicting statements, whether of the same or  
22 of different witnesses, and you should do so if it can be done  
23 fairly and satisfactorily. If, however, you decide that there  
24 is a genuine and irreconcilable conflict of testimony, it is  
25 your function and duty to determine which, if any, of the

1 contradictory statements you will believe.

2 As judges of the facts, you as the jurors are the  
3 only judges of the credibility of the witnesses and their  
4 testimony. This means that you must judge the truthfulness  
5 and accuracy of each witness's testimony and decide whether to  
6 believe all, part or none of that witness's testimony.

7 If you decide that a witness has deliberately  
8 falsified testimony on a significant point, you should take  
9 this into consideration in deciding whether or not to believe  
10 the rest of the testimony. Then, and in that event, you may  
11 refuse to believe the rest of the testimony, but you are not  
12 required to do so.

13 You are not required to accept testimony even though  
14 the testimony is uncontradicted and the witness is not  
15 discredited. For example, you may decide, because of the  
16 witness's bearing and demeanor or because of the witness's  
17 testimony on other subjects, that such testimony is not  
18 believable. As we touched upon at the beginning of this  
19 trial, the following are some of the factors that you may  
20 consider when judging credibility and deciding whether or not  
21 to believe a witness:

22 Number one, was the witness able to see, hear or know  
23 the things about which he or she testified?

24 Number two, how well could the witness remember and  
25 describe those things?

1           Number three, was the ability of the witness to see,  
2           hear, know, remember or describe those things affected by  
3           youth or old age or by any physical, mental or other  
4           intellectual deficiency?

5           Number four, did the witness testify in a convincing  
6           manner? How did the witness look, act and speak while  
7           testifying? Was the testimony uncertain, confused,  
8           self-contradictory or presented in any kind of evasive manner?

9           Number five, did the witness have any interest in the  
10          outcome of the case or any bias, prejudice or any other motive  
11          that might have affected the testimony?

12          Number six, how well does the testimony of the  
13          witness square with the other evidence in the case, including  
14          exhibits and the testimony of other witnesses? Was it  
15          contradicted or supported by the other evidence and testimony?

16          Number seven, does the testimony make sense to you?

17          Number eight, if you believe some part of the  
18          testimony of a witness to be inaccurate, consider whether that  
19          inaccuracy cast doubt upon the rest of that same witness's  
20          testimony. This may depend on whether the inaccuracy is as to  
21          an important matter or a minor detail.

22          Number nine, you should also consider any possible  
23          explanation for the inaccuracy. To that end, did the witness  
24          make an honest mistake or simply forget, or was there a  
25          deliberate attempt to present false testimony to you?

1           Number ten, if you find that a witness deliberately  
2 testified falsely on a material point, that is, on a matter  
3 that might affect the outcome of the trial, you may, for that  
4 reason alone, choose to disbelieve other parts or all of that  
5 same witness's testimony but you are not required to do so.  
6 You should consider not only the deliberate falsehood but also  
7 any other factors that may bear on the witness's credibility  
8 in deciding whether to believe other parts of that witness's  
9 testimony.

10           And, number eleven, while you are judging the  
11 credibility of each witness, you are likely to be judging the  
12 credibility of other witnesses or other evidence in the case.  
13 If there is a real irreconcilable conflict, as I advised, it  
14 is up to you to decide which, if any, of the conflicting  
15 testimony or evidence you believe.

16           As the only judges of credibility and facts in this  
17 case, you, the jurors, are responsible to give the testimony  
18 of every witness and all the other evidence whatever  
19 credibility and weight you think it is entitled to receive.

20           Let me also explain the law does not require any  
21 party to call as witnesses all persons who may have been  
22 present at any time or place involved in this case or who may  
23 appear to have some knowledge of the matters at issue in this  
24 trial. Generally, all witnesses are available to all parties,  
25 and no negative inference is to be drawn by you from the fact

1 that certain potential witnesses were not called by either  
2 side to testify.

3 To assist juries in deciding cases such as this one  
4 involving scientific, technical or other specialized knowledge  
5 beyond that possessed by lay persons, the law allows an expert  
6 witness with special education and experience to present  
7 opinion testimony. You've heard from the following expert  
8 witnesses: Dr. Leonard Zamore, Dr. Steven Shore, Dr. Edward  
9 Karotkin, Dr. James Kenkel, Dr. Theonia Boyd, Dr. Susan  
10 Coffin, Dr. Steve Ringer and Dr. Harold Wiesenfeld.

11 An expert witness gives his or her opinion to a  
12 reasonable degree of professional certainty based upon the  
13 assumption of certain facts. However, as I previously  
14 instructed you, you do not have to accept an expert's opinion  
15 just because he or she is considered an expert in his or her  
16 field.

17 In evaluating an expert witness's testimony or  
18 resolving any conflicting expert witness's testimony, you  
19 should consider the following:

20 Number one, the witness's knowledge, skill,  
21 experience, training and education.

22 Number two, whether you find the facts the witness  
23 relied upon in reaching his or her opinion are accurate.

24 And number three, all of the believability factors  
25 I've already given to you as to lay witnesses.



1           To the extent that expert witnesses were asked to  
2       assume that certain facts were true and to give an opinion  
3       based upon those assumptions, these are called hypothetical  
4       questions. If you find that an important fact assumed in a  
5       hypothetical question has not been established by the  
6       evidence, you should disregard the expert's opinion given in  
7       response to that question.

8           Similarly, if the expert has made it clear that his  
9       or her opinion is based on the assumption that an important  
10      fact did not exist and you find that it did exist, you should  
11      disregard that opinion.

12           Turning to the specific claims in this case,  
13      plaintiffs allege claims of professional negligence against  
14      the United States, the hospital defendants for their actions  
15      and the actions and/or omissions of their employees, including  
16      Dr. Hilary Jones. Given same, I'll now discuss professional  
17      negligence and other terms necessary to your evaluation of  
18      plaintiffs' claims.

19           Professional negligence consists of a negligent,  
20      careless or unskilled performance by a physician of the duties  
21      imposed on him or her by the professional relationship with  
22      the patient. It is also negligence when a physician shows a  
23      lack of proper care and skill in the performance of the  
24      professional act.

25           A physician must have the same knowledge and skill

1 and use the same care normally used in the medical profession.  
2 A physician whose conduct falls below this standard of care is  
3 negligent.

4 Similarly, a physician who professes to be a  
5 specialist in a particular field of medicine must have the  
6 same knowledge and skill and use the same care as others in  
7 that same medical specialty. A specialist whose conduct does  
8 not meet this professional standard of care is negligent.

9 Under this standard of care, a physician must also  
10 keep informed of the contemporary developments in the medical  
11 profession or his or her specialty and must use current skills  
12 and knowledge.

13 In other words, a physician must have up-to-date  
14 medical skills and knowledge, and if he or she fails to keep  
15 current or fails to use current knowledge in the medical  
16 treatment of the patient, the physician is negligent.

17 A professional medical negligence or medical  
18 malpractice case is a civil action for damages and nothing  
19 more. You must decide only the issue of whether plaintiffs  
20 have suffered injuries as a result of any or all of the  
21 defendants' negligence and are thus entitled to monetary  
22 compensation for those injuries. Your verdict does not  
23 involve punishment of the hospital physicians or even  
24 criticism of their professional abilities beyond the facts of  
25 this case, nor does your verdict involve their reputations,

1 medical practices or rights as a licensed physician and/or  
2 hospital.

3 In fact, you should not concern yourselves with any  
4 other matters such as social or political issues relating to  
5 medicine. No thought should be given to these irrelevant  
6 considerations in reaching your verdict.

7 Plaintiffs also allege claims of corporate negligence  
8 against the hospital defendants. A hospital is directly  
9 liable to the patient if it violates a duty that it owes to  
10 the patient to ensure the patient's safety and well-being  
11 while under the care of the hospital. The following are the  
12 duties that a hospital must fulfill and that it cannot pass on  
13 to anyone else:

14 Number one, a duty to use reasonable care in the  
15 maintenance of safe and adequate facilities and equipment.

16 Number two, a duty to select and retain only  
17 competent physicians and health care personnel.

18 Number three, a duty to oversee all persons who  
19 practice nursing within its walls as to patient care.

20 And, number four, a duty to formulate, adopt and  
21 enforce adequate rules and policies to ensure quality care for  
22 the patients.

23 If you decide that the hospital defendants violated  
24 any one of those duties, you must then decide, one, whether  
25 the health care institution knew or should have known of the

1 breach of that duty, and two, that the conduct was a factual  
2 cause in bringing about the harm or injury.

3 In this case, it is admitted that the defendant  
4 Hilary Jones was acting as the agent of the defendant,  
5 Heritage Valley Pediatrics, known as the principal, and was  
6 engaged in furthering the interests, activities, affairs or  
7 business of her principal.

8 A principal is liable for the negligence of its agent  
9 occurring while the latter was acting in the course and within  
10 the scope of his or her agency. In this case, it's also  
11 admitted that the nurses and resident doctor were, at the time  
12 of the occurrence, acting as the employees of the defendant,  
13 Heritage Valley Beaver Hospital known as the employer and were  
14 engaged in furthering the interests, activities, affairs or  
15 business of their employer.

16 An employer is liable for the negligence of its  
17 employee occurring while the latter was acting in the course  
18 and within the scope of his or her employment.

19 Therefore, if you find defendant Hilary Jones to be  
20 liable, you must find Heritage Valley Pediatrics also liable.  
21 If, however, you find that she is not liable, then you must  
22 find Heritage Valley Pediatrics not liable.

23 Similarly, if you find the nurses and resident doctor  
24 to be liable, then you must find Heritage Valley Beaver  
25 Hospital also liable. If, however, you find the nurses and

1 resident doctor not to be liable, then you must find the  
2 hospital defendants not liable.

3           You are further instructed that Dr. Dumpe, at all  
4 relevant times, was acting as the agent of the United States  
5 working as a part of a federally funded clinic. Thus, if you  
6 find Dr. Dumpe liable, then you must find the United States  
7 also liable. If, however, you find Dr. Dumpe was not  
8 negligent, then you must find the United States not liable.

9           If you find that any or all of the defendants  
10 violated a duty it, he or she owed to the plaintiffs, then you  
11 must decide whether that defendant's negligence was a factual  
12 cause of the plaintiffs' injuries. If you so decide, you must  
13 decide the amount of damages the plaintiff sustained as a  
14 result of the defendant's negligence.

15           Conduct is a factual cause of harm when the harm  
16 would not have occurred absent the conduct. To be a factual  
17 cause, the conduct must have been an actual real factor in  
18 causing the harm, even if the result is unusual or unexpected.  
19 A factual cause cannot be an imaginary or fanciful factor  
20 having no connection or only an insignificant connection with  
21 the harm. To be a factual cause, the defendant's conduct need  
22 not be the only factual cause.

23           The fact that some other causes concur with the  
24 negligence of the defendant in producing an injury does not  
25 relieve the defendant from liability as long as that

1 defendant's own negligence is a factual cause of the injury.

2 When a physician or a nurse negligently fails to act  
3 or negligently delays in taking indicated diagnostic or  
4 therapeutic steps and his or her negligence is a factual cause  
5 of injuries to the plaintiffs, that negligent physician or  
6 nurse is responsible for the injuries caused. When a hospital  
7 violates a duty to ensure patient safety and well-being while  
8 under the care of the hospital, the hospital can be negligent  
9 in its own right.

10 Additionally, a hospital can be negligent because of  
11 the acts or omissions of its employees. If you find the  
12 hospital to be negligent, you must also consider whether that  
13 negligence is a factual cause of the injuries to the  
14 plaintiffs.

15 Where the plaintiffs present expert testimony that  
16 the failure to act or delay on the part of the physician or  
17 nurse has increased the risk of harm to the plaintiffs, this  
18 testimony, if found credible, provides a sufficient basis from  
19 which you may find that the negligence was a factual cause of  
20 the injuries sustained. If, however, you find that the  
21 plaintiffs' injuries would have been sustained even if the  
22 hospital, physicians or nurses had not been negligent, then  
23 the defendants cannot be said to have been the factual cause  
24 of the harm.

25 If you find that there has been any significant

1 possibility of avoiding injuries and the defendants have  
2 destroyed that possibility, they may be liable to the  
3 plaintiffs. That said, there is no presumption or inference  
4 of negligence merely because medical care ended in an  
5 unfortunate result which might have occurred even though  
6 proper care and skill was exercised.

7 As you likely know, it is rarely possible to  
8 demonstrate to an absolute certainty what would have happened  
9 under circumstances that any alleged wrongdoer did not allow  
10 to occur. Sometimes a person's negligent conduct combines  
11 with another's conduct to cause harm. When a defendant's  
12 negligent conduct combines with the conduct of other persons,  
13 the defendant is legally responsible if its, his or her  
14 negligent conduct was one of the factual causes of the harm.

15 In such a case, Dr. Dumpe, Dr. Jones and/or the  
16 hospital defendants are fully responsible for the harm  
17 suffered by Kendall Peronis, Carissa Peronis and Matthew  
18 Fritzius regardless of the extent to which Dr. Dumpe,  
19 Dr. Jones and/or the hospital defendants contributed to the  
20 harm.

21 Additionally, sometimes two or more people are  
22 negligent but only one person's negligent conduct factually  
23 caused the plaintiffs harm and it is uncertain which person  
24 caused the harm. Under such circumstances, each negligent  
25 defendant has the burden of proving that he, she or it did not

1 factually cause the plaintiffs' harm. If you decide that any  
2 or all of the defendants were negligent and that the  
3 negligence of those parties was a factual cause of the  
4 plaintiffs' harm, you must then decide how much each party's  
5 negligence contributed to plaintiffs' harm.

6 You've seen the verdict slip. You've read through  
7 the verdict slip. Looking at that verdict slip, you should  
8 state each party's share of the negligence in the form of a  
9 percentage. Together, those percentages must total 100  
10 percent.

11 Now, the fact that I am instructing you about damages  
12 does not imply any opinion on my part as to whether damages  
13 should be awarded. If you find that the defendants are liable  
14 to the plaintiffs, you must then find an amount of money  
15 damages you believe will fairly and adequately compensate the  
16 plaintiffs for all the physical and financial injury they  
17 sustained as a result of the negligence you found.

18 The amount you award today must compensate the  
19 plaintiffs completely for damages sustained in the past as  
20 well as all damages the plaintiffs will sustain in the future  
21 as a consequence of that negligence.

22 When a person dies, the damages they would have been  
23 entitled to go to their estate or survivors. The estate and  
24 survivors are just as entitled to these damages as the  
25 deceased person would have been had she survived. The



1 plaintiffs individually and in the case of Carissa Peronis, as  
2 the administratrix of the decedent's estate, claim damages  
3 under the Pennsylvania Wrongful Death Act and Survival Act.

4 They are entitled to make a claim under both acts,  
5 but the damages must not be duplicative. If your verdict is  
6 in favor of the plaintiffs, you must then find the amount of  
7 money damages that you believe fairly and adequately  
8 compensate them for all the physical injuries and financial  
9 damages sustained as a result of the negligence you found.

10 The amount you award today must completely compensate  
11 the plaintiffs on behalf of the decedent's estate for all  
12 damages sustained in the past as well as all damages you find  
13 will be sustained in the future. As you have seen, the  
14 verdict sheet contains a series of questions that will lead  
15 you to a proper verdict. There are places for you to record  
16 your verdict as to each item of damages.

17 I'll now describe them.

18 Under The Wrongful Death Act, the damages recoverable  
19 by plaintiffs are as follows:

20 First, future loss contributions. The plaintiffs are  
21 entitled to be awarded a sum of money that fairly and  
22 adequately compensates them for the value of all sums the  
23 decedent would have contributed to the support of her family  
24 between today and the end of her life expectancy. This  
25 includes all amounts of money that the decedent would have

1 spent for or given to her family for such items as shelter,  
2 food, clothing, medical care, education, entertainment, gifts  
3 and recreation during her life expectancy.

4 Second, past and future noneconomic damages. In  
5 addition to the monetary contributions the decedent would have  
6 contributed to her family's support, the plaintiffs are  
7 entitled to be awarded a sum that will fairly and adequately  
8 compensate her family for the monetary value of the services,  
9 society and comfort that she would have given to her family  
10 had she lived.

11 Under The Survival Act, the damages recoverable by  
12 the plaintiffs are as follows:

13 Future loss of earnings. The plaintiffs are entitled  
14 to be awarded the value of the net amount that the decedent  
15 would have earned between today and the end of her life  
16 expectancy.

17 Again, net earnings for this period are decided as  
18 follows:

19 You must first calculate the total amount of the  
20 decedent's gross earnings between today and the end of her  
21 life expectancy. From this amount, you must deduct the amount  
22 of monetary contributions she would have made to her family  
23 during this period which you have already awarded under The  
24 Wrongful Death Act. Your award to the estate for total lost  
25 future net earnings thus represents the total net earnings

1 over the decedent's work life expectancy.

2 To decide the decedent's gross earnings between today  
3 and the end of her life expectancy, you must decide the total  
4 amount the decedent would have earned during her life if the  
5 injury and resulting death had not occurred. In deciding the  
6 sum to be awarded for future loss of earnings, you must  
7 consider the evidence that has been presented to you  
8 concerning the effect of productivity and inflation on the  
9 amount of this loss.

10 You should also consider the following:

11 Number one, the decedent's age, educational and work  
12 experience, if any.

13 Number two, the decedent's physical condition before  
14 the injury and death.

15 Number three, the work that the decedent would have  
16 been doing in the future had the injury and death not  
17 occurred.

18 Number four, the effect increases in productivity may  
19 have on the amount of this loss.

20 Number five, the effect inflation will have on the  
21 amount of this loss.

22 And, number six, any other matters in evidence that  
23 you find to be relevant to this determination.

24 After you have decided the decedent's loss of future  
25 earnings, that sum must be reduced to present value. To that

1 end, you should consider and evaluate the expert testimony you  
2 have heard concerning reduction to present value based upon a  
3 reasonably secure fixed income investment. The sum of money  
4 awarded for future loss of earnings shall be recorded as a  
5 single amount. You are to add each of these items of damage  
6 together in proper categories and return your verdict in two  
7 lump sum amounts, one under The Wrongful Death Act and the  
8 second under The Survival Act.

9 In order to decide the damages recoverable in this  
10 case, you must first decide the number of years the decedent  
11 would have lived had she not died as a result of this  
12 incident. According to statistics compiled by the  
13 United States Department of Health and Human Services, the  
14 average life expectancy of all persons of decedent's age at  
15 the time of the incident, sex and race was 81.4 years. This  
16 figure is offered to you only as a guide and you are not bound  
17 to accept it if you believe that decedent would have lived  
18 longer or less than the average individual in her category.

19 In reaching this decision, you are to consider  
20 decedent's health prior to the accident, her family's manner  
21 of living, personal habits and other factors that may have  
22 affected the duration of her life.

23 Now, as I previously indicated and as you know, you  
24 have a verdict slip before you, and generally at this stage, I  
25 would read that verdict slip aloud, but I saw each and every

1 one of you read the verdict slip, so I'm going to spare you my  
2 reading aloud of the verdict slip.

3 But let me tell you this: In order for you to answer  
4 the questions on the jury slip, each juror must agree to the  
5 answer. In other words, your answers to each question must be  
6 unanimous.

7 During your deliberations, the court asks that you  
8 pay close attention to the instructions on the verdict form  
9 and only answer the questions that you are instructed to  
10 consider. Further, nothing said on the verdict form is meant  
11 to suggest what your verdict should be. You alone have the  
12 responsibility for deciding the verdict.

13 I will now instruct you on your conduct as jurors  
14 during deliberations. As jurors, you have a duty to consult  
15 with one another and to deliberate with the intention of  
16 reaching a verdict. Each of you must decide this case for  
17 yourself but only after a full and impartial consideration of  
18 all the trial evidence with your fellow jurors. Listen to  
19 each other carefully.

20 In the course of your deliberations, you should feel  
21 free to reexamine your own views and to change your opinion  
22 based upon the evidence, but you should not give up your  
23 honest convictions about the evidence just because of the  
24 opinions of your fellow jurors, nor should you change your  
25 mind just for the purpose of reaching a verdict.

1           As you were previously instructed and as I repeat,  
2           you must perform your duties as jurors fairly. Do not let any  
3           bias, sympathy or prejudice that you may feel toward one side  
4           or the other influence your decision in any way. Remember at  
5           all times, you are not partisans. You are the judges. Judges  
6           of the facts. Your sole interest is to seek the truth from  
7           the evidence in this case.

8           When you retire to the jury room to deliberate, you  
9           will take with you your notes and the exhibits that the court  
10          has admitted into evidence. You'll select one member of the  
11          jury to act as your foreperson. That person will preside over  
12          deliberations and will speak for you here in open court. You  
13          may also want to select a member to act as secretary to record  
14          your votes. Once you have selected a foreperson and  
15          secretary, you may take the verdict form and begin to complete  
16          it.

17          When you start deliberating, do not talk to me, my  
18          law clerks, the courtroom deputy, the bailiff and alternate  
19          bailiff or anyone but each other about the case. During your  
20          deliberations, you must not communicate with or provide any  
21          information to anyone by any means about this case.

22          You may not use any electronic device or media such  
23          as a cell phone, smartphone or computer of any kind, the  
24          Internet, any Internet service or any text or instant  
25          messaging service, any Internet chat room, blog, website or

1 social networking service, such as Facebook, Twitter,  
2 LinkedIn, Instagram or YouTube to communicate to anyone any  
3 information about this case or to conduct any research about  
4 the case until I accept your verdict.

5 As you have been told, you may not use these  
6 electronic means to investigate or communicate about the case  
7 because it's important that you decide this case based solely  
8 on the evidence presented in this courtroom. Information on  
9 the Internet or available through social media may be wrong,  
10 incomplete or inaccurate.

11 Also, information that you might see on the Internet  
12 or on social media has not been admitted into evidence and the  
13 parties have not had a chance to discuss it with you. Hence,  
14 you should not seek or obtain such information and it must not  
15 influence your decision in this case.

16 If, during your deliberations, you have any questions  
17 or messages for me, please write them down on a piece of  
18 paper, have the foreperson sign them, and then push the button  
19 on the wall in the jury room and give the note to the bailiff  
20 or alternate bailiff who will bring it to my attention. I  
21 will then respond as soon as I can, either in writing or by  
22 having you return to the courtroom so I can address you  
23 orally.

24 Note, I may have to talk to the lawyers about what  
25 you have asked so it may take some time to get back to you. I

1 caution you, however, with regard to any message or any  
2 question you might send, you should never write down or tell  
3 anyone your numerical division at that time.

4 For example, do not write down or tell anyone that a  
5 certain number of jurors is voting one way or another. Your  
6 vote should stay secret until you are finished. When you have  
7 reached agreement as to your verdict, you will fill it in,  
8 have your foreperson date the form, and all the jurors will  
9 sign the form. You will then ring for the bailiff.

10 I repeat, you cannot return a verdict until you agree  
11 that it is the right verdict. I will stress that each of you  
12 should be in agreement with the verdict which is announced in  
13 court. Once your verdict is announced in open court and  
14 officially recorded, it cannot ordinarily be revoked.

15 Unless I direct you otherwise, do not reveal your  
16 answers until you are returned to the courtroom to deliver  
17 your verdict. As you know, and you already have a copy of the  
18 verdict form which has been prepared for you, you'll take this  
19 form to the jury room, and when you've reached unanimous  
20 agreement as to your verdict, you'll fill it in, have your  
21 foreperson date and sign it, as I indicated, and you'll then  
22 return to this courtroom, and your foreperson will provide the  
23 verdict to my deputy who in turn will provide it to me.  
24 Unless I direct you otherwise, do not reveal your answers on  
25 the verdict slip until you are discharged.



1           After you have reached a verdict and you are  
2           discharged, you are not required to talk with anyone about  
3           this case unless you should choose to do so or I order you to  
4           do so. If you choose to do so, remember do not reveal the  
5           votes of other jurors in your deliberations. Rather, you can  
6           provide counsel with your general impressions of the case.

7           Once again, I want to remind you that nothing about  
8           my instructions and nothing about the verdict form is intended  
9           to suggest or convey in any way or manner what I think your  
10          verdict should be. It is your sole and exclusive duty and  
11          responsibility to determine the verdict. As the court now  
12          administers the oath to the bailiff and the alternate bailiff,  
13          please recall the bailiffs, as with all court personnel, are  
14          forbidden to communicate in any way or any manner with any  
15          member of the jury on any subject touching upon the merits of  
16          this case.

17          At this time, Mr. Galovich will administer the oath  
18          initially to Ms. Starr and then Ms. Starr to Mr. Galovich.

19               (Bailiff sworn.)

20               (Alternate bailiff sworn.)

21          THE COURT: At this time, I'm going to call counsel  
22          to sidebar to see if there are any changes or corrections to  
23          the final jury instructions.

24               (At sidebar.)

25          THE COURT: Now, Mr. Price, are there any additions

1 or corrections to the instructions you would like to put on  
2 the record? Any argument you would like to put on the record  
3 at this time?

4 MR. PRICE: No, Your Honor.

5 THE COURT: Same question to Ms. Koczan.

6 MS. KOCZAN: No, Your Honor.

7 THE COURT: Mr. Colville and Mr. O'Connor?

8 MR. COLVILLE: No, Your Honor.

9 MR. O'CONNOR: No, Your Honor.

10 THE COURT: The only other thing I would say while we  
11 are all here at sidebar vis-a-vis the argument we had  
12 concerning Mr. Price's closing remarks, relative to  
13 instructions, to the extent that they need be given, in  
14 addition to what I already said as all would have heard, they  
15 were specifically instructed not to concern themselves with  
16 any other matters such as social or political issues relating  
17 to medicine. They shouldn't give these irrelevant  
18 considerations any thought in reaching their verdict so that  
19 was part of this instruction as well.

20 And so to that end, I think what we've done here is  
21 adequately covered that issue, but the objection is certainly  
22 preserved.

23 I will also say I polled a number of my colleagues on  
24 that front, so in any event, in addition to the research that  
25 we did over the break. So if there's nothing further, I'm

1 going to give the jurors their final instructions and then  
2 they'll depart. Mr. Galovich has ordered lunch. It's due  
3 here at 12:30.

4 (In open court.)

5 THE COURT: My clerk, Ms. Starr, reminds me that as I  
6 gave the instruction, I had noted in one place we referenced  
7 "it" and I made it he and/or she, which was appropriate, so  
8 we're going to make that correction in the written  
9 instructions, and once she completes that, then between her  
10 and Mr. Galovich, we'll have copies made for each of you.

11 Now, at this point in time, I think you all have your  
12 binders and your notebooks and you are going to get to  
13 actually take those with you this time. You'll now be  
14 escorted to the jury room. Ms. Starr and Mr. Galovich will be  
15 escorting you as not only deputy but also alternate bailiff  
16 and Ms. Starr as bailiff.

17 The reason we do that, if by chance Ms. Starr would  
18 become sick or unavailable, then Mr. Galovich becomes the  
19 deputy. Please take with you those notepads, any pencils or  
20 pen and also you'll be taking the copy of the verdict slip.  
21 Mr. Galovich also has for you the court official verdict slip  
22 you'll also take with you.

23 As I noted, Ms. Starr will be in charge of you during  
24 your deliberations. Again, you can't ask her any questions,  
25 not even administrative questions. As I've already stated, if

1 you have any question or message, you are to reduce your  
2 question or message to writing, signed by your foreperson.  
3 You are to pass the note to the bailiff. In turn, it will be  
4 brought to my attention.

5 Again, I'll respond as quickly and promptly as  
6 possible either in writing or by having you return to the  
7 courtroom so that the court can address you orally.

8 Once again, I caution you, however, with regard to  
9 any message or question that you might send that you should  
10 never state or specify your numerical division at that time.

11 On behalf of the parties, their attorneys, all the  
12 witnesses that have appeared, this court and all of its  
13 personnel, once again I thank each and every one of you for  
14 your kind attention through this trial and your willingness to  
15 serve as jurors in this case.

16 With that, Mr. Galovich and Ms. Starr will be  
17 escorting you. Please rise for our jurors.

18 (Jury excused.)

19 THE COURT: Thank you. While Mr. Galovich and  
20 Ms. Starr tend to the jurors, as you witnessed, Ms. Starr will  
21 make that one correction, she'll scrub so it doesn't say  
22 discussion draft anymore, and Mr. Galovich will print out  
23 sufficient copies so each of them have a copy of the  
24 instructions, and he'll walk those back, and the next thing  
25 I'd like you all to do is take a piece of paper and write down

1 all of your contact information, including cell phone numbers,  
2 so that Mr. Galovich and/or Ms. Starr can get ahold of you now  
3 that the jury has gone out.

4 Will Precise be taking down all of their equipment at  
5 this point?

6 MR. PRICE: Yes.

7 THE COURT: So the courtroom is obviously not booked  
8 the rest of the afternoon, so you and your team can certainly  
9 do what you need to do to dismantle the equipment. That works  
10 for me. In terms of anything else, is there anything for the  
11 record anybody wants to put on the record at this time?

12 MR. PRICE: No.

13 MS. KOCZAN: No.

14 THE COURT: Everybody is shaking their head no. Does  
15 anybody want a copy of the trial transcript at this time?

16 MS. KOCZAN: No.

17 MR. PRICE: No.

18 THE COURT: Not yet. Enjoy your lunch and if we get  
19 a question or concern, we'll let you know. I have to say, in  
20 the past, we have had requests early on for things like  
21 markers, new erasers. We had one instance where the bathroom  
22 wasn't working, so those kinds of things, I tend to handle on  
23 my own and then let you know about them, but obviously any  
24 question of substance, any time they want to have part of the  
25 instruction looked at, reread or the like, we'll obviously get

1 your input. But to my knowledge, everything is in working  
2 order back there and we should have sufficient supplies. Have  
3 a good afternoon, everybody.

4 (Recess taken at 12:32 p.m.-4:00 p.m.)

5 THE COURT: Mr. Galovich has told me the jury has  
6 arrived at a verdict.

7 THE CLERK: Yes, Your Honor. I'm still waiting for  
8 Mr. Price.

9 THE COURT: Sorry. I didn't realize he wasn't there.

10 Mr. Price, we have been informed there's a verdict.

11 (Jury present.)

12 THE COURT: Thank you, ladies and gentlemen of the  
13 jury. The court has been advised through its deputy and the  
14 bailiff that you have rendered and reached a verdict. At this  
15 point in time, will you please provide the verdict to  
16 Mr. Galovich, my deputy?

17 Thank you. Mr. Galovich, if you'll please publish  
18 the verdict.

19 THE CLERK: Yes, Your Honor. Members of the jury  
20 empaneled in the case of Carissa Peronis, individually and as  
21 administratrix of the estate of Kendall Peronis, and Matthew  
22 Fritzius versus United States of America, Valley Medical  
23 Facilities, Inc., trading and doing business as Heritage  
24 Valley Pediatrics Valley Medical Facilities, Inc., trading and  
25 doing business as Heritage Valley Beaver and Hilary Jones,

1 M.D. at civil action No. 16-1389, you say you find:

2 One, "Do you find that the conduct of any of the  
3 defendant doctors or other medical providers fell below the  
4 applicable standard of medical care? In other words, were any  
5 of the defendants negligent?"

6 Defendant, United States of America: No.

7 Defendant, Heritage Valley Beaver hospital: No.

8 Defendant, Hilary Jones: No.

9 So say you all?

10 (The panel of jurors answer yes.)

11 THE COURT: Let the record reflect that not only did  
12 the jurors indicate by nodding their heads but also speaking  
13 yes. Does anyone want to poll the jury?

14 MR. PRICE: Yes, please.

15 THE COURT: Mr. Price has requested the poll.

16 Mr. Galovich, you may proceed.

17 THE CLERK: Juror number 1, please rise. Is the  
18 verdict as read your verdict?

19 JUROR NO. 1: Yes.

20 THE CLERK: Please be seated. Juror No. 2, please  
21 rise. Is the verdicts as read your verdict?

22 JUROR NO. 2: Yes.

23 THE CLERK: Please be seated. Juror No. 3, please  
24 rise. Is the verdict as read your verdict?

25 JUROR NO. 3: Yes.

1 THE CLERK: Juror No. 4, please rise. Is the verdict  
2 as read your verdict?

3 JUROR NO. 4: Yes.

4 THE CLERK: Juror No. 5, please rise. Is the verdict  
5 as read your verdict?

6 JUROR NO. 5: Yes.

7 THE CLERK: Juror No. 6, please rise. Is the verdict  
8 as read your verdict?

9 JUROR NO. 6: Yes.

10 THE CLERK: Juror No. 7, please rise. Is the verdict  
11 as read your verdict?

12 JUROR NO. 7: Yes.

13 THE CLERK: Juror No. 8, please rise. Is the verdict  
14 as read your verdict?

15 JUROR NO. 8: Yes.

16 THE CLERK: Your Honor, the jury has been polled.

17 THE COURT: Thank you, Mr. Galovich. You have the  
18 original of the verdict slip to make part of the court record  
19 in this case.

20 Once again, ladies and gentlemen of the jury, I  
21 appreciate all of the attention that you gave to this case  
22 over the last almost two weeks. The court, as well as the  
23 attorneys and the litigants who are here, also appreciate your  
24 attention and the duty that you fulfilled in serving as  
25 jurors. As I hope you've seen by your service here, it's a



1 very important function that we are engaged in here both as  
2 the court, the attorneys as well as you, the jurors, to  
3 ultimately find the facts and reach a verdict in this case.

4 Now, with that, I'm going to permit you all to be  
5 escorted by Mr. Galovich and Ms. Starr one more time, and  
6 Mr. Galovich will probably have some additional administrative  
7 instructions for you concerning your jury service. So once  
8 again, we all appreciate the time, the energy and the  
9 sacrifice that you made. I trust this has been a good  
10 experience for each and every one of you. Once again, let's  
11 all rise for our jury.

12 (Jury excused.)

13 THE COURT: Now, we have received the verdict, but as  
14 the government knows, the case is not yet over until the court  
15 renders its opinion vis-à-vis Dr. Dumpe and enters a verdict  
16 on behalf of Dr. Dumpe and the United States of America.

17 Gentlemen, how would you like to proceed? Do you  
18 want to order the transcript? Are you going to give me  
19 additional briefing? How are we going to proceed?  
20 Mr. Colville?

21 MR. COLVILLE: Findings of fact and conclusions of  
22 law.

23 THE COURT: That's what I normally do and I normally  
24 request preparation of the transcript, and then once the  
25 transcript is completed, 30 days to prepare findings of fact

1 and conclusions of law, 30 days to respond, then the court  
2 writes. So the government in this instance will be ordering  
3 the transcript or not?

4 MR. COLVILLE: Yes, we will.

5 THE COURT: Mr. Price?

6 MR. PRICE: I would assume, yes.

7 THE COURT: So the court orders preparation of the  
8 transcript and the cost to be borne equally by both Mr. Price  
9 and his clients as well as the United States and Mr. Colville.

10 I must say, Ms. Leo has done yeowoman's service. She  
11 is actually to have been rotated to another judge. I'm not  
12 sure if she'll get it out in her usual good form within 30  
13 days, but I'm sure she'll make every attempt to do that.

14 So once we have the transcript, as I said, I normally  
15 give people 30 days to prepare findings of fact and  
16 conclusions of law. That would come first from you,  
17 Mr. Price, as the party with the burden of proof and then from  
18 you, Mr. Colville, another 30 days after. I don't anticipate  
19 that you would need argument. The court already has the rough  
20 drafts of your closing arguments here today, so I'll be  
21 looking at those and of course when we have the full  
22 transcript, they will also be available there.

23 Is there anything else then for the court's attention  
24 here today?

25 MR. PRICE: No.

1 MR. COLVILLE: No, Your Honor.

2 MS. KOCZAN: No.

3 THE COURT: Ms. Leo has indicated that she thinks she  
4 can get me the transcript within 30 days, so we should get the  
5 transcript by October 7, 2019 and then, Mr. Price, could you  
6 have your findings of fact and conclusions of law by November  
7 7?

8 MR. PRICE: Yes.

9 THE COURT: Does that work for your schedule?

10 MR. PRICE: Yes.

11 THE COURT: And then on your end, Mr. Colville, the  
12 7th falls on the weekend, so can you have your findings of  
13 fact and conclusions of law by December 9?

14 MR. COLVILLE: Yes.

15 THE COURT: All right. Then once again, is there  
16 anything else for the court's attention at this time?

17 MR. PRICE: No.

18 THE COURT: Thank you all for trying this case. It  
19 was the court's pleasure to preside over same, and I look  
20 forward to the further briefing in this case.

21 Mr. Galovich is giving the jurors their instructions  
22 in terms of their reimbursement and the like. Normally I go  
23 back and I thank them for their service. I'll do that in this  
24 instance and just keep it to that. Given the fact that, as we  
25 know vis-à-vis Dr. Dumpe, it's an advisory verdict, if that.

1 The court still has to make its determinations vis-à-vis  
2 Dr. Dumpe and the United States. Okay. Thank you all.

3 (At 4:19 p.m., the proceedings were adjourned.)  
4

5 C E R T I F I C A T E

6 I, BARBARA METZ LEO, RMR, CRR, certify that the  
7 foregoing is a correct transcript from the record of  
8 proceedings in the above-entitled case.

9 \s\ Barbara Metz Leo  
10 BARBARA METZ LEO, RMR, CRR  
11 Official Court Reporter  
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09/25/2019  
Date of Certification